United States Court of Appeals

for the Second Circuit

JOINT APPENDIX

76-7243

B
P/S

United States Court of Appeals

FOR THE SECOND CIRCUIT

AUBREY B. LANK, as Receiver of
PICKARD & COMPANY, INCORPORATED,

Plaintiff-Appellee,

against

THE NEW YORK STOCK EXCHANGE,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

JOINT APPENDIX

MILBANK, TWEED, HADLEY & MCCLOY
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UNITED STATES COURT OF APPEALS
FILED
AUG 13 1976
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

PAGINATION AS IN ORIGINAL COPY

TABLE OF CONTENTS

	PAGE
Docket Entries	1a
Summons and Complaint	4a, 6a
Answer and Counterclaims	16a
Reply to Counterclaims	24a
Defendant's notice of motion for an order dismissing the complaint and granting summary judgment, affidavit of Robert M. Bishop with exhibits and defendant's statement pursuant to Rule 9(g)	26a
Affidavit of plaintiff in opposition to defendant's motion for an order dismissing the complaint and granting summary judgment with exhibits	84a
Affidavit of J. Edward Meyer, III, in opposition to defendant's motion to dismiss	115a
Affidavit of Robert S. Carlson in opposition to defendant's motion to dismiss and for summary judgment with exhibits	117a
Plaintiff's statement pursuant to Rule 9(g)	198a
Affidavit of Russell E. Brooks in support of the defendant's motion to dismiss and for summary judgment with exhibits	200a
Affidavit of John J. Jerome in support of defendant's motion to dismiss and for summary judgment	211a
Supplemental Answering Affidavit of J. Edward Meyer, III	212a

PAGE

Memorandum Opinion and Order of Judge Morris E. Lasker, dated December 29, 1975, granting the defendant's motion to dismiss for lack of capacity to the extent plaintiff seeks to recover claims of Pickard's creditors, subordinated lenders and shareholders, granting summary judgment as to liability to defendant on its first and second counterclaims and denying defendant's motion in all other respects ---------- 215a

Memorandum Endorsement of Judge Morris E. Lasker, dated April 15, 1976, granting defendant's motion for an order pursuant to 28 U.S.C. § 1292(b) certifying for immediate appellate review two questions determined by the Memorandum Opinion and Order of December 29, 1975 ---- 245a

Counter-Order, dated April 26, 1976, pursuant to 28 U.S.C. § 1292(b) modifying and re-entering the Memorandum Opinion and Order of December 29, 1975 so as to certify for immediate review by the United States Court of Appeals for the Second Circuit two questions decided in that Opinion and Order ---------- 247a

Memorandum Opinion of Judge Morris E. Lasker, dated April 30, 1976, in connection with the certification of certain questions to the United States Court of Appeals ---------- 249a

Docket Entries

JUDGE LASKER

CIVIL DOCKET
UNITED STATES DISTRICT COURT

Jury demand date: 12-17-71
BY PLTFF.

71 CIV. 5525

D. C. Form No. 106 Rev.

TITLE OF CASE	ATTORNEYS
AUBREY S. LANK, AS RECEIVER OF PICKARD & COMPANY, INCORPORATED, AGAINST, THE NEW YORK STOCK EXCHANGE .	For plaintiff: ROTH, CARLSON, KWIT, SPENGLER & GOODELL 280 Park Avenue. N.Y.C.N.Y. 10017 For defendant: Milbank, Tweed, Hadley & McCloy 1 Chase Manhattan Plaza, NY 10005

STATISTICAL RECORD	COSTS		DATE	NAME OR RECEIPT NO.	REC.	DISB.
J.S. 5 mailed X	Clerk		12/17/71	Rorn, C	15 —	
			12/21/71	U Stamp		15 —
J.S. 6 mailed REOPENED 4-7-75	Marshal					
Basis of Action: S.E.C. AC.T 1934 $2,072, 715.94	Docket fee					
	Witness fees					
Action arose at:	Depositions					

A[illegible] B. LANK, ETC, Vs. THE NEW YORK STOCK EXCHANGE

71 CIV. 552

Page #2

DATE	PROCEEDINGS	Date Order or Judgment Noted
~~DEC17-71~~	~~FILED COMPLAINT. ISSUED SUMMONS.~~	
1/4/72	Filed Summons and marshals ret. Served: Robert Haack, Pres., etc. by Jane Tarrant, Sec. on 12/28/71.	
Jan.18-72	Filed stipulation and order extending defendant's time to answer complaint to 2/17/72. So ordered. Weinfeld, J.	
Jan.19-72	Filed Request for Production of Documents pur. to Rule 34.	
Feb.17-72	Filed stipulation and order extending defendant's time to answer complaint to 3/17/72. So ordered. MacMahon, J.	
Mar.1-72	Filed stipulation and order that the date on which deft. must respond to pltf's. Request for Production of Documents is 3/17/72. So ordered. Tenney, J.	
Mar.17-72	Filed stipulation and order extending defendant's time to respond to plaintiff's Request for Production of Documents to 4/17/72. So ordered. Metzner, J.	
Apr.18-72	Filed ANSWER of New York Stock Exchange Inc. to complaint, and counterclaim.	MTRM
Apr.18-72	Filed Defendant's Response to Plaintiff's Request for Production of Documents.	
May 17-72	Filed Reply to counterclaims .	
Feb 11-75	Filed Order that this action is statistically closed.. .Lasker,J. m/n	
Mar 21-75	Filed Pltff's Motion to compel porduction of Documents....ret. 4-10-75 at 10Am Rm 2903.	
ar 21-75	Filed Pltff's Affdvt. in support of Motion to compel production..	
3-31-75	Filed Deft's Notice of Motion fo r an order dismissing the complt pur. to Rule 41(b).....ret. 4-10-75...at 10AM Rm 2903.	
3-31-75	Filed Memo. of Low by deft. in support of his motion to dismiss and for summary judg.	
3-31-75	Filed Deft's affdvt. by Russell E. Brooks, in opposition to pltff's motion to compel production of documents.	
3-31-75	Filed Deft's memo of Law in opposition to motion to compel production of documents.	
4-4-75	Filed Pltff's Memo of Law in support of his motion to compel production of documents.	
3-21-75	Filed Pltff's Notice to take depesition of deft. by LLoyd McChesney.	
4-7-75	Filed Order that the order of 2-11-75...statistically closing the action is vacated and the case is reopened. Lasker,J. mn	
4-8-75	Filed Pltff's Affdvt. pur. to Gen Rule 9(f).	
4-25-75	Filed Pltff affdvt by A.B. Lank, Receiver in opposition to deft's motion for an order dismissing complt. and granting it summ. judg.	
4-25-75	Filed Pltff's Affdvt by J. E. Meyer III in opposition to deft's motion to dismiss.	
4-25-75	Filed Pltff's Memo of Law in opposition to deft's motion to dismiss.	
4-25-75	Filed Pltff's Statement pur. to Rule 9(g)	
4-25-75	Filed Pltff's Affdvt. by R. S. Carlson in opposition to deft's motion to dismiss.	
4-30-75	Filed Deft's affdvt. by R.E. Brooks, in support of its motion to dismiss and for summ. judg.	
4-30-75	Filed Reply Memo. of deft. in support of its motion to dismiss.	
4-30-75	Filed Deft's MEMORANDUM in support of its motion to dismiss.	
5-1-75	Filed Pltff Supp. Answering Affdvt. by J. E. Meryer III.	
12-29-75	Filed Opinion #43634. The motion to dismiss for lack of capacity is granted to the extent Lank seeks to recover claims of Pickard's creditiors, subordinated lenders & shareholders. Summary judgment is granted on the 1st & 2nd counterclaims as to liability. In all other respects the motion is denied. Lasker J. (mailed notice)	
12-31-75	Filed Memo. End. on motion dtd.3-21-75.The motion to compel discovery is granted. Lasker J. (mailed notice)	
1-19-76	Filed Dft. N.Y.Stock Exchange Inc. Notice of Deposition of pltff. on 2-24-76.	
1-21-76	Filed Request of Dft. N.Y. Stock Exchange Inc for Production of Documents of Pltff.	
2-5-76	Filed Defts. Affidavit and Notice of Motion for an order modifying & re-entering the Opinion & Order so as to certify for review by USCA. Ret. 2-16-76.	
2-5-76	Filed Deft. Memorandum in support of defts. application for certification pur. to 28 USC 1292.	

cont'd

71 Civil 5525 A. Lank etc. vs. The N.Y. Stock Exchange

D. C. 110 Rev. Civil Docket Continuation Page #3

DATE	PROCEEDINGS	Date Ord Judgment
02-13-76	Filed Pltffs. Memorandum of Law in opposition to defts. motion for Certification pur. to 28 USC 1292.	
02-26-76	Filed Stip & Order extending Deft's. time to produce to 3-4-76. Pltff's. deposition is adjourned to 3-16-76.....Lasker,J.	
04-12-76	Filed Pltff's. notice of taking deposition of the Deft. by Robert M. Bishop on 5-12-76.	
04-15-76	Filed Memo End on Deft's. motion to certify for immediate appellate review. Motion granted. Submit order on notice.....Lasker,J. (mailed notice)	
05-03-76	Filed Counter Order that Deft's. motion for certification for immediate review by the U.S. Court of Appeals for the Second Circuit is granted....Lasker,J. (mailed notice)	
05-03-76	Filed Opinion #44337 - The counter-order proposed by Pltff's. counsel in connection with certification to the U.S.C.A. has been filed today.....Lasker,J. (mailed notice)	
05-11-76	Filed Deft's. response to Pltff's. request for production of documents.	

Summons

SUMMONS IN A CIVIL ACTION

CIV. 1a (2-61)
(Formerly D. C. Form No. 45a Rev. (6-49))

United States District Court

FOR THE

SOUTHERN DISTRICT OF NEW YORK

CIVIL ACTION FILE NO. 71 C

AUBREY B. LANK, as Receiver of
Pickard & Company, Incorporated,

Plaintiff

v.

THE NEW YORK STOCK EXCHANGE,

Defendant

SUMMONS

To the above named Defendant :

You are hereby summoned and required to serve upon ROTH, CARLSON, KWIT, SPENGLER & GOODELL,

plaintiff's attorneys, whose address is 280 Park Avenue, New York, New York 10017

an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

/s/ [illegible]
Clerk of Court.

/s/ [illegible]
Deputy Clerk.

Date: December 17, 1971

[Seal of Court]

Note:—This summons is issued pursuant to Rule 4 of the Federal Rules of Civil Procedure.

BEST COPY AVAILABLE

RETURN ON SERVICE OF WRIT

I hereby certify and return, that on the day of 19 .

I received this summons and served it together with the complaint herein as follows:

MARSHAL'S FEES

Travel ___ $ _____

Service ___ _____

_____

United States Marshal.

By _____

Deputy United States Marshal.

Subscribed and sworn to before me, a this

day of , 19 .

[SEAL]

_____

Note:—Affidavit required only if service is made by a person other than a United States Marshal or his Deputy.

No. _____

United States District Court
FOR THE
SOUTHERN DISTRICT OF NEW YORK

AUBREY B. LANK, as Receiver of Pickard & Company, Incorporated,

Plaintiff,

v.

THE NEW YORK STOCK EXCHANGE,

Defendant.

SUMMONS IN CIVIL ACTION

Returnable not later than 20 days after service.

[illegible], CARLSON, KNIT, SPENGLER & [illegible],
Office & P. O. Address,
330 Park Avenue,
New York, New York 10017,
212 [illegible].

Attorney for Plaintiff

FPI—8S—1-2-68—275M—2036

Complaint

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

- x

AUBREY B. LANK, as Receiver of Pickard & Company, Incorporated,

Plaintiff,

-against-

THE NEW YORK STOCK EXCHANGE,

Defendant.

- x

71 Civ. 5525

COMPLAINT

Plaintiff Demands Trial by Jury

Plaintiff, by his attorneys, Roth, Carlson, Kwit, Spengler & Goodell, for his complaint, alleges:

I.

JURISDICTION AND VENUE

1. Jurisdiction of this Court is based upon the Securities Exchange Act of 1934 (the "Act"), as amended, 15 U.S.C. §§ 78a et seq., the Rules and Regulations of the Securities and Exchange Commission (the "SEC") promulgated thereunder and the common law.

2. This Court has jurisdiction of this action under Section 27 of the Act, 15 U.S.C. § 78aa, and under its pendent jurisdiction.

3. The matter in controversy exceeds, exclusive of interest and costs, the sum of ten thousand dollars.

4. The wrongs complained of took place, in substantial part, in the Southern District of New York, and the defendant transacts business in the Southern District of New York.

II.

THE PARTIES

5. The plaintiff, Aubrey B. Lank, was appointed Receiver of Pickard & Company, Incorporated ("Pickard"), a Delaware corporation, by order of the Court of Chancery of the State of Delaware, in and for New Castle County, dated April 22, 1969.

6. At all relevant times until February 13, 1968, Pickard conducted a general securities business, was registered with the SEC as a broker-dealer and investment advisor and was a member firm of defendant The New York Stock Exchange (the "Exchange"). On February 13, 1968, Pickard ceased conducting a general securities business. Since that time, Pickard's only activity has been its own liquidation.

7. The defendant Exchange was at all relevant times an unincorporated association under the laws of the State of New York of brokers and dealers in securities having its principal place of business in this District. In February, 1971 the Exchange became a not-for-profit corporation organized and existing under the laws of the State of New York.

III.

CONDUCT AND REGULATION OF THE EXCHANGE

8. The Exchange, for the purpose of inducing persons to deal with its members, holds itself out to the public generally and to those who deal with its members, in particular, as exercising a high degree of care with respect to the conduct of its

business and that of its members and as supervising the activities of its members to the end that those who deal with its members will be protected against loss by reason of fraud or dishonest acts or unsound business practices of its members.

9. The Exchange is and at all relevant times has been a national securities exchange registered as such with the SEC pursuant to the provisions of Section 6 of the Act, 15 U.S.C. § 78f. By reason of such registration and the provisions of such Section 6, and by reason of its Constitution and Rules, the Exchange has, and at all relevant times had, the duty, inter alia:

(a) To comply and to enforce, so far as within its powers, compliance by its members with the provisions of the Act;

(b) To assure that each of its members keeps accurate and current records of its business transactions;

(c) To enforce compliance by its members with its Rules, including its Rules pertaining to net capital requirements;

(d) To prevent false or misleading advertising or other public statements by its members;

(e) To take such steps, and to impose such restrictions, on the activities of its members as may be required for the protection of those who deal with its members;

(f) To have adequate and timely controls to detect and monitor both the operational and financial problems of its members; and

(g) To exercise general supervision over each of its members in order to assure that the business of each member is being operated in a prudent manner and consistent with high standards of commercial practice and

integrity.

10. In pursuance of such obligations, the Exchange adopted various rules, including Rule 325, known as the "net capital rule", the purpose of which is to ensure that all member firms have enough liquid capital to meet the financial needs of their businesses. Rule 325 requires that a member firm's aggregate indebtedness not exceed twenty times its net capital (as such terms are defined in Rule 325). Rule 325 requires that the Exchange (subject to exceptions not here applicable) shall cause a member firm in violation thereof to cease doing business. Moreover, the Exchange itself puts member firms on a restricted list and subjects them to greater surveillance as their net capital ratio approaches 20 to 1. The purpose of the Rule was and is to insure that such firms, if in trouble, could be suspended or liquidated at a time when they still have enough liquid capital assets to cover the claims of their customers, creditors and members of the public.

11. In derogation of its obligations to its members, the SEC and the investing public, the Exchange, however, at all times acted like a "private club" and adopted a policy of not enforcing its own rules designed to protect the investing public and, in particular, the Exchange adopted a policy of not enforcing Rule 325 preferring rather to attempt to have its members work out their problems although in violation of Rule 325, notwithstanding the Exchange's obligations under Section 6 of the Act to enforce its own rules for the protection of the public.

12. The Exchange knew or in the exercise of reasonable prudence should have known as early as October, 1966 that Pickard was in violation of the Exchange's net capital rule and that its operational problems were critical.

13. Moreover, on information and belief, the SEC notified the Exchange in 1967 of Pickard's inability to furnish the SEC with certain financial and operating records.

14. However, in pursuance of its "private club" approach, the Exchange continued to do nothing, notwithstanding its knowledge of Pickard's long-standing violation of the net capital and other rules of the Exchange, and although, in violation of the Exchange's own rules, the Exchange permitted Pickard to continue the operation of its business.

15. As a result of such failure by the Exchange to fulfill its obligations and suspend Pickard from membership in the Exchange when it should have done so in 1966, damage was subsequently suffered by Pickard, the investing public and Pickard's creditors and shareholders.

16. Subsequent to the time when the Exchange should have suspended Pickard's membership, Pickard continued to carry on its business as a member firm of the Exchange, buying and selling securities for its own account and for its customers, inducing the advance of subordinated loans, selling shares of its capital stock and incurring debts in the ordinary course of its business.

17. Moreover, because of the failure of the Exchange to fulfill its obligations, the course of Pickard's business continued to deteriorate and there occurred defalcations by registered representatives of Pickard and by its principal officers, John Pickard and Peter Pickard, neither of which would have occurred had the Exchange fulfilled the obligations imposed upon it by law.

18. Finally, on February 9, 1968, the Exchange ordered Pickard to restrict its business so as not to accept any orders from customers which would require them to deliver cash or securities to Pickard. On February 13, 1968, the voting stockholders, but not the non-voting stockholders or subordinated lenders of Pickard, entered into an agreement with the Exchange by which the Exchange assigned a number of its employees to work on Pickard's books and records in order to prepare a meaningful statement of Pickard's financial condition. As of this date, Pickard's only activity was its own liquidation, and the Exchange's belated assumption of the business and financial affairs could not rectify the damage caused by the Exchange's earlier failure to enforce its own rules.

19. Charges with respect to such defalcations were filed with the Board of Governors of the Exchange, and, after a hearing on August 7, 1968, the Board of Governors found that John Pickard and Peter Pickard, the President and Vice President, respectively, of Pickard had withdrawn in excess of $650,000 of Pickard's funds without the knowledge of the other officers and directors. The Messrs. Pickard were expelled as allied members of the Exchange and lesser sanctions were imposed on another officer.

20. On August 5, 1968, the SEC initiated proceedings against the Messrs. Pickard and other Pickard employees. As a result of such proceedings, the broker-dealer and investment advisor registrations of Pickard were revoked, bar orders were issued against the Messrs. Pickard and disciplinary action was taken against other employees of Pickard.

IV

THE CLAIMS

FOR A FIRST CLAIM AGAINST
THE DEFENDANT EXCHANGE

21. Plaintiff repeats and realleges each of the allegations contained in Paragraphs 1 through 20 above as though fully set forth in this paragraph.

22. The Exchange owed a duty to customers of Pickard, to its stockholders, to all persons, firms or entities doing business with Pickard and to the subordinated lenders of Pickard to enforce compliance by Pickard with the Securities Exchange Act of 1934, the rules and regulations promulgated thereunder and its own rules and regulations including the provisions of its net capital rule. Had the Exchange fulfilled such duty, all defalcations occurring subsequent to October, 1966 and all losses to customers, subordinated lenders, shareholders and all creditors of Pickard who advanced money to Pickard subsequent to October, 1966 would have been prevented.

23. By reason of the Exchange's knowledge that Pickard had violated the Act and the rules and regulations promulgated thereunder, as well as the Exchange's own rules and regulations, and as a direct result of the Exchange's failure to enforce the Act and such rules and regulations, Pickard's customers, subordinated lenders, shareholders and creditors who advanced money to Pickard subsequent to October, 1966 have suffered substantial damages.

24. By its aforesaid conduct, the Exchange has violated, inter alia, Sections 6 and 17 of the Act and the rules and regulations promulgated thereunder and Rule 325 of the New York Stock Exchange.

FOR A SECOND CLAIM AGAINST
THE DEFENDANT EXCHANGE

25. This Court has jurisdiction of this claim pursuant to the doctrine of pendent jurisdiction.

26. Plaintiff repeats and realleges each of the allegations contained in Paragraphs 1 through 23 hereof as though fully set forth in this paragraph.

27. The Exchange's failure to suspend or revoke Pickard's membership in the Exchange constituted a continuing representation to the public that Pickard was a responsible member firm of the Exchange which conducted its business in accordance with just and equitable principles of trade. The Exchange's knowledge that Pickard had violated the Act and the rules and regulations promulgated thereunder, as well as the Exchange's own rules and regulations, not only constituted a scheme and artifice by the Exchange to defraud, but also made the Exchange an aider and abettor of Pickard's violation of the Act and the rules and regulations promulgated thereunder.

28. By the aforesaid acts and failures to act, the defendant Exchange has wilfully committed fraudulent and deceitful acts upon Pickard's customers, subordinated lenders, shareholders and creditors by misrepresenting various and numerous facts upon which such customers, subordinated lenders, shareholders and creditors relied in investing in and transacting business with Pickard thereby causing damages to such parties and is accountable to plaintiff for such damages.

FOR A THIRD CLAIM AGAINST THE DEFENDANT EXCHANGE

29. This Court has jurisdiction of this claim pursuant

to the doctrine of pendent jurisdiction.

30. Plaintiff repeats and realleges each of the allegations contained in Paragraphs 1 through 23 hereof as though fully set forth in this paragraph.

31. By its aforesaid conduct, the Exchange was so wilfully derelict in its obligations to Pickard and the customers, subordinated lenders, shareholders and creditors of Pickard and so grossly negligent and malicious and conducted itself with such reckless disregard for the rights of such parties, that plaintiff seeks and is entitled to recover compensatory damages from the Exchange in the amount of $2,072,715.94 and exemplary damages in an amount to be fixed by this Court.

FOR A FOURTH CLAIM AGAINST THE DEFENDANT EXCHANGE

32. This Court has jurisdiction of this claim pursuant to the doctrine of pendent jurisdiction.

33. Plaintiff repeats and realleges each of the allegations contained in Paragraphs 1 through 23 hereof as though fully set forth in this paragraph.

34. By reason of Pickard's application to the Exchange to become a member firm of the Exchange and the Exchange's acceptance of Pickard as a member firm of the Exchange, Pickard and the Exchange entered into an implied contract whereby the Exchange, inter alia, agreed to enforce the applicable sections of the Act and the rules and regulations promulgated thereunder, as well as its own rules and regulations, with respect to Pickard to the end that Pickard and its customers, subordinated lenders, shareholders and creditors and the investing public in general would receive and suffer protection from and against various

financial and business events and practices of a harmful nature.

35. By its aforesaid conduct, the Exchange has committed numerous material breaches of such implied contract thereby causing substantial damages to Pickard's customers, subordinated lenders, shareholders and creditors and is accountable to plaintiff for such damages.

36. By reason of the foregoing, plaintiff demands judgment against the Exchange for (a) the sum of $269,648.00 paid to the Exchange out of the proceeds of the sale of Pickard's membership in the New York Stock Exchange, plus interest; (b) the sum of $99,650.00 paid by Pickard on February 19, 1969 to the Special Trust Fund of the Exchange, plus interest; (c) the sum of $1,032,220.00 representing all sums advanced by subordinated lenders to Pickard subsequent to October, 1966, plus interest; (d) the sum of $205,126.27 representing all sums due general creditors of Pickard, plus interest; (e) the sum of $466,071.67 representing sums paid by purchasers of shares of stock of Pickard subsequent to October, 1966; and (f) costs plus Receiver's and attorney fees.

WHEREFORE, plaintiff demands judgment against defendant for the sum of $2,072,715.94 plus interest and exemplary damages in an amount to be fixed by this Court together with costs and Receiver's and attorney fees.

ROTH, CARLSON, KWIT, SPENGLER & GOODELL

By _____
A Member of the Firm

Attorneys for Plaintiff,
Office & P. O. Address,
280 Park Avenue,
New York, New York 10017,
212 682-4444.

Answer and Counterclaims

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

- x

AUBREY B. LANK, as Receiver of Pickard & Company, Incorporated, :

Plaintiff, :

-against- : 71 Civ. 5525

THE NEW YORK STOCK EXCHANGE, : ANSWER AND COUNTERCLAIM

Defendant. :

- x

Defendant New York Stock Exchange, Inc. (the "Exchange") by its attorneys, Milbank, Tweed, Hadley & McCloy, for answer to the complaint and for a counterclaim:

1. Denies each and every allegation contained in paragraph 1, except admits that jurisdiction is alleged to be based on the designated statute, rules and regulations, and common law.

2. Denies each and every allegation contained in paragraph 2, except admits that the Court is alleged to have jurisdiction under the designated statute and the principle of pendent jurisdiction.

3. Denies each and every allegation contained in paragraph 3, except admits that the matter in controversy is alleged to exceed $10,000, exclusive of interest and costs.

4. Denies each and every allegation contained in paragraph 4, except admits that the Exchange transacts business in the Southern District of New York.

5. Denies each and every allegation contained in paragraph 6, except admits that prior to February 13, 1968 Pickard

conducted a general securities business, was registered with the SEC as a broker-dealer and investment advisor, and was a member organization of the Exchange.

6. Denies each and every allegation contained in paragraph 8.

7. Denies each and every allegation contained in paragraph 9, except admits that since October 1, 1934, the Exchange has been registered as a national securities exchange with the Securities and Exchange Commission pursuant to Section 6 of the Securities Exchange Act of 1934 and refers to said statute and the Exchange's constitution and rules for a full, accurate and complete statement of their terms.

8. Denies each and every allegation contained in paragraph 10, except admits that the Exchange has adopted various rules, including Rule 325, and refers to said rule for a full, accurate and complete statement of its terms, requirements and purposes.

9. Denies each and every allegation contained in paragraph 11.

10. Denies each and every allegation contained in paragraph 12, except admits that Pickard did violate the Exchange's capital rule as of June 30, 1966 and alleges that said violation was promptly corrected as a result of Exchange supervision.

11. Denies each and every allegation contained in paragraph 13, except admits that in 1967 the Securities and Exchange Commission advised the Exchange that Pickard's general ledger and stock record postings were not current and alleges that thereafter such postings were brought current as a result of Exchange supervision.

12. Denies each and every allegation contained in paragraphs 14, 15, 16 and 17.

13. Denies each and every allegation contained in paragraph 18, except admits that on February 9, 1968 the Exchange ordered Pickard to restrict its business to liquidating transactions, that on February 13, 1968 the Exchange executed an agreement with Pickard, its voting stockholders, and others, and refers to said agreement for a full, accurate, and complete statement of its terms, and that pursuant to said agreement Exchange employees were sent to assist Pickard at Pickard's expense as hereinafter alleged.

14. Denies each and every allegation contained in paragraph 22, except admits that the Exchange is a national securities exchange registered with the Securities and Exchange Commission pursuant to Section 6 of the Securities Exchange Act of 1934, and refers to said statute for a full, accurate and complete statement of the duty of the Exchange thereunder.

15. Denies each and every allegation contained in paragraphs 23 and 24.

16. Denies each and every allegation contained in paragraph 25, except admits that the Court is alleged to have jurisdiction of the second claim against the Exchange pursuant to the doctrine of pendent jurisdiction.

17. Denies each and every allegation contained in paragraphs 27 and 28.

18. Denies each and every allegation contained in paragraph 29, except admits that the Court is alleged to have jurisdiction of the third claim against the Exchange pursuant to the doctrine of pendent jurisdiction.

19. Denies each and every allegation contained in paragraph 31.

20. Denies each and every allegation contained in paragraph 32, except admits that the Court is alleged to have jurisdiction of the fourth claim against the Exchange pursuant to the doctrine of pendent jurisdiction.

21. Denies each and every allegation contained in paragraphs 34, 35 and 36.

FIRST AFFIRMATIVE DEFENSE

22. Plaintiff lacks capacity to bring this action on behalf of subordinated lenders, general creditors and purchasers of shares of stock of Pickard & Co., Incorporated.

SECOND AFFIRMATIVE DEFENSE

23. Plaintiff has failed to join as parties herein the subordinated lenders, general creditors and purchasers of shares of stock of Pickard & Co., Incorporated subsequent to October 1966 as described in the complaint, and said persons are necessary parties to this action pursuant to Rule 19 of the Federal Rules of Civil Procedure.

THIRD AFFIRMATIVE DEFENSE

24. All claims asserted against the Exchange in the complaint are based upon the Exchange's alleged failure to prevent certain wrongs by Pickard & Co., Incorporated and/or its principal officers-shareholders or to advise the public of such wrongs.

25. Plaintiff stands in the shoes of Pickard & Co., Incorporated and is therefore charged with the knowledge and the wrongs alleged to have been perpetrated by Pickard & Co., Incorporated and/or its principal officers-shareholders.

26. Plaintiff is therefore prevented from asserting the

claims alleged in the complaint by the doctrines of bar, estoppel, waiver and contributory negligence.

FOURTH AFFIRMATIVE DEFENSE

27. The claims alleged in the complaint are barred by the applicable statute of limitations.

FIFTH AFFIRMATIVE DEFENSE

28. The claims alleged in the complaint are barred by the doctrine of laches.

SIXTH AFFIRMATIVE DEFENSE

29. The claims alleged in the complaint on behalf of subordinated lenders, general creditors and purchasers of shares of stock of Pickard & Company, Incorporated subsequent to October 1966 are barred by the doctrine of contributory negligence.

SEVENTH AFFIRMATIVE DEFENSE

30. The claims alleged in the complaint on behalf of subordinated lenders, general creditors and purchasers of shares of stock of Pickard & Company, Incorporated, subsequent to October 1966 are barred by the doctrine of waiver.

FIRST COUNTERCLAIM

31. Pursuant to agreements dated February 13, 1968 and May 16, 1968, Pickard & Company, Incorporated agreed to reimburse the Exchange for certain expenses incurred by the Exchange pursuant to the liquidation of Pickard & Company, Incorporated.

32. There is due and owing to the Exchange pursuant to said agreements the amount of $56,712.09, plus interest, which, despite due demand, plaintiff has refused to pay.

SECOND COUNTERCLAIM

33. Pursuant to agreement dated May 16, 1968, the Trustees of the New York Stock Exchange Special Trust Fund discharged the obligations of Pickard & Company, Incorporated to

certain banks and received assignments from said banks of the indebtedness of Pickard & Company, Incorporated.

34. The Exchange has been duly authorized by the Trustees of the New York Stock Exchange Special Trust Fund to collect on behalf of the Trustees the aforesaid assigned indebtedness, which on July 24, 1970 amounted to $170,295.42, with interest accruing thereon.

35. Despite due demand upon plaintiff for repayment of said indebtedness and interest, plaintiff has refused payment thereof.

THIRD COUNTERCLAIM

36. The claims asserted in the complaint are entirely without merit, and the prosecution of this action constitutes waste of the assets of Pickard & Company, Incorporated entrusted to plaintiff.

37. The Exchange, which is a creditor of Pickard & Company, Incorporated, as aforesaid, has advised plaintiff that this action constitutes waste of the assets of Pickard & Company, Incorporated to which the Exchange has made valid claim.

38. Plaintiff Aubrey B. Lank, in his personal capacity, and not as Receiver of Pickard & Company, Incorporated, is therefore liable to the Exchange for its proportionate creditor's share of any amounts expended in any way from the assets of Pickard & Company, Incorporated by him as Receiver in connection with the prosecution of this action.

WHEREFORE, defendant New York Stock Exchange, Inc. demands judgment:

(a) dismissing the complaint with costs and disbursements;

(b) on its first counterclaim in the amount of $56,712.09 with interest, costs and disbursements;

(c) on its second counterclaim in the amount of $170,295.42 with interest, costs and disbursements; and

(d) on its third counterclaim against Aubrey B. Lank in his personal capacity, and not as Receiver, in the Exchange's proportionate creditor's share for waste of the assets of Pickard & Company, Incorporated in the amount to be determined by the Court equal to the amount of assets of Pickard & Company, Incorporated expended in the prosecution of this action.

MILBANK, TWEED, HADLEY & McCLOY

By William E. Jackson
(A member of the firm)
1 Chase Manhattan Plaza
New York, N.Y. 10005
Attorneys for defendant-counter-claimant
New York Stock Exchange, Inc.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

- x

AUBREY B. LANK, as Receiver of Pickard & Company, Incorporated,

Plaintiff,

-against-

THE NEW YORK STOCK EXCHANGE,

Defendant.

- x

AFFIDAVIT OF SERVICE

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

JAMES J.HAUGH, being duly sworn, deposes and says:

I am over the age of 18 years and am not a party to this action.

On April 17, 1972 I served the within Answer and Counterclaim on Roth, Carlson, Kwit, Spengler & Goodell by depositing a true copy thereof, securely enclosed in a postpaid wrapper, addressed to them at 280 Park Avenue, New York, New York in a mailbox maintained by the Government of the United States at 1 Chase Manhattan Plaza, New York, New York.

James J Haugh

Sworn to before me this
18th day of April, 1972.

Steven L. Krolewski

STEVEN L. KROLEWSKI
NOTARY PUBLIC, State of New York
No. 31-2205556
Qualified in New York County
Commission Expires March 30, 1973

Reply to Counterclaims

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

AUBREY B. LANK, as Receiver of Pickard & Company, Incorporated, Plaintiff, -against- THE NEW YORK STOCK EXCHANGE, Defendant.	REPLY TO COUNTERCLAIMS 71 Civ. 5525

Plaintiff Aubrey B. Lank, by his attorneys, Roth, Carlson, Kwit, Spengler & Goodell, for his reply to defendant's counterclaims, alleges as follows:

AS TO THE FIRST COUNTERCLAIM

1. Denies each and every allegation contained in paragraph 31 of the answer and counterclaim, except admits that Pickard & Company, Incorporated entered into agreements dated as of February 13, 1968 and May 16, 1968 with The New York Stock Exchange and refers to the said agreements for a full, complete and accurate statement of their terms, provisions, conditions and effect thereof.

2. Denies each and every allegation contained in paragraph 32 of the answer and counterclaim, except admits that defendant has made such demand, and plaintiff has refused to pay.

AS TO THE SECOND COUNTERCLAIM

3. Denies that he has any knowledge or information sufficient to form a belief as to the truth of the allegations

contained in paragraphs 33 and 34 of the answer and counterclaim.

4. Denies each and every allegation contained in paragraph 35 of the answer and counterclaim, except admits that plaintiff has refused payment.

AS TO THE THIRD COUNTERCLAIM

5. Denies each and every allegation contained in paragraph 36 of the answer and counterclaim.

6. Denies each and every allegation contained in paragraph 37 of the answer and counterclaim, except admits that defendant has claimed that this action constitutes waste of the assets of Pickard & Company, Incorporated.

7. Denies each and every allegation contained in paragraph 38 of the answer and counterclaim.

WHEREFORE, plaintiff Aubrey B. Lank demands judgment dismissing defendant's counterclaims, together with the costs and disbursements of this action.

ROTH, CARLSON, KWIT, SPENGLER & GOODELL

By _____
A Member of the Firm

Attorneys for Plaintiff,
Office & P. O. Address,
280 Park Avenue,
New York, New York 10017,
212 682-4444.

Defendant's Notice of Motion

OFFICE COPY

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

- -x

AUBREY B. LANK, as Receiver of Pickard & Company, Incorporated,

Plaintiff,

-against-

THE NEW YORK STOCK EXCHANGE,

Defendant.

- -x

71 Civ. 5525 (MEL)

NOTICE OF MOTION

S I R S :

PLEASE TAKE NOTICE that upon the complaint, the answer and counterclaims, the annexed affidavit of Robert M. Bishop and the exhibits thereto, and the annexed Statement Pursuant to Rule 9(g), the undersigned will move this Court in Room 2903 at the United States Courthouse, Foley Square, New York, N.Y., on April 10, 1975, at 10 A.M. or as soon thereafter as counsel can be heard for an order (1) dismissing the complaint (A) pursuant to Rule 41(b) of the Federal Rules of Civil Procedure for failure of the plaintiff to prosecute, (B) pursuant to Rules 12(b)(6) and 56 of the Federal Rules of Civil Procedure for failure to state a claim upon which relief can be granted and (C) pursuant to the applicable statute of limitations, CPLR § 214(2), and (2) granting summary judgment pursuant to Rule 56 to the Exchange on its counterclaims on the ground that there is no genuine dispute as to any material fact and defendant Exchange is entitled to judgment as a matter of law, and for such other relief as may be proper.

Dated: New York, N.Y.
March 31, 1975

Yours, etc.,

MILBANK, TWEED, HADLEY & McCLOY

By _____
(A Member of the Firm)
One Chase Manhattan Plaza
New York, N.Y. 10005
Attorneys for Defendant
New York Stock Exchange, Inc.

TO:
SPENGLER CARLSON
GUBAR & CHURCHILL
280 Park Avenue
New York, N.Y. 10017

Affidavit of Robert M. Bishop

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - - - - -x

AUBREY B. LANK, as Receiver of Pickard & Company, Incorporated,

Plaintiff,

-against-

THE NEW YORK STOCK EXCHANGE,

Defendant.

- - - - - - - - - - - - - - - - - - - -x

71 Civ. 5525 (MEL)

AFFIDAVIT

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

ROBERT M. BISHOP, being duly sworn, says:

1. I am Senior Vice President of defendant New York Stock Exchange, Inc. (the "Exchange") and am in charge of its Regulation and Surveillance Group. I make this affidavit in support of the Exchange's motion to dismiss and for summary judgment. The facts hereinafter stated are either known to me or derived from the records of the Exchange kept in the ordinary course of business in my possession, custody and control.

2. The Exchange is a not-for-profit corporation incorporated under the laws of the State of New York. At all times relevant to this action, the Exchange was an unincorporated association existing under the laws of the State of New York. The Exchange is composed of individuals engaged in the securities business. It has 1,366 members, the majority of whom are associated with an aggregate of 523 organizations (either partnerships or corporations, hereinafter "member organizations") engaged in the securities business.

3. The Exchange is registered as a national securities exchange with the Securities and Exchange Commission pursuant to Section 6 of the Securities Exchange Act of 1934. Upon applying for such registration in September, 1934, the Exchange was required by Section 6 of the Act to submit its constitution and rules to the Commission and the Commission was required to determine, as a precondition to registration, that "the exchange applying for registration is so organized as to be able to comply with the provisions of this title [the Exchange Act], the rules and regulations thereunder and that the rules of the exchange are just and adequate to insure fair dealing and to protect investors" (Section 6(d)). By order of September 28, 1934, the Commission so determined and registered the Exchange effective as of October 1, 1934. The Exchange has continued to be registered as a national securities exchange.

4. In 1968, I was a vice president of the Exchange and director of its Department of Member Firms. As such I was involved in supervision of Pickard & Company, Incorporated ("Pickard") which at the time was a member organization of the Exchange. I participated in the decisions which led to the liquidation of Pickard.

5. In 1968 Lloyd W. McChesney was Chief Examiner in the Department of Member Firms under my supervision. I was familiar with the work he did at Pickard. That work and the events which preceded it are accurately set forth in his affidavit by which the Exchange petitioned the Delaware Court of Chancery for appointment of a receiver of Pickard. A copy of his affidavit is annexed hereto as Exhibit A.

6. Pickard entered into an agreement with the Exchange on February 13, 1968 by which Pickard was unable to obtain the

assistance of Exchange employees. A copy of that agreement is annexed hereto as Exhibit B.

7. On May 16, 1968, Pickard and all of its voting stockholders entered into a further agreement with the Exchange by which Pickard was able to obtain additional assistance from Exchange employees and financial assistance from the Special Trust Fund of the Exchange. A copy of that agreement is annexed hereto as Exhibit C.

8. The Exchange and the Special Trust Fund fully performed all of their obligations under those two agreements. Pursuant to the terms of those agreements, Pickard became indebted to the Exchange and to the Special Trust Fund. Some of that indebtedness has been repaid. However, at the time the counterclaims in this action were asserted, Pickard was indebted to the Exchange in the amount of $56,712.09 plus interest and to the Special Trust Fund in the amount of $170,295.42 plus appropriate interest. The Special Trust Fund has duly authorized the Exchange to collect this indebtedness.

9. The Exchange and the Special Trust Fund have made claims for these amounts of indebtedness in the receivership proceeding in Delaware, as well as the counterclaims in this action. Despite such demand neither the Exchange nor the Special Trust Fund has been paid.

Robert M. Bishop

Sworn to before me
March 31, 1975.

John Bolos, Jr.

JOHN BOLOS, JR.
Notary Public, State of New York
No. 31-5274611
Qualified in [illegible] Co.
Comm. Expires March 31, 1976

AMJ:bc
3/19/69

Exhibit A to Bishop Affidavit—Affidavit of Lloyd W. McChesney

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

NEW YORK STOCK EXCHANGE, an Unincorporated Association under the Laws of the State of New York, Plaintiff, -against- PICKARD & COMPANY, INCORPORATED, a Corporation Incorporated in the State of Delaware, Defendant.	Civil Action No. AFFIDAVIT

STATE OF NEW YORK

COUNTY OF NEW YORK

LLOYD W. McCHESNEY, being duly sworn, deposes and says:

1. I am the Liquidator of Pickard & Company, Incorporated ("Pickard") and have served in this position, since May 21, 1968, pursuant to an agreement dated as of May 16, 1968 between Pickard, the voting stockholders of Pickard and the New York Stock Exchange (copy attached, Exhibit G, discussed at paragraphs 14-16 below). I am also Chief Examiner of the New York Stock Exchange.

2. The plaintiff, the New York Stock Exchange ("Exchange"), a creditor of Pickard, has instituted this action for the appointment of a receiver on the ground of Pickard's insolvency.

I submit this affidavit in support of a motion by defendant for an order relieving it of the obligation to answer the complaint and providing for notice of these proceedings to be sent to the subordinated lenders (listed in Exhibit A) and the stockholders (listed in Exhibit B) of Pickard so that any of them who desire to do so may appear and show cause why the prayers of the complaint should not be granted. The subordinated lenders and the stockholders are the only persons who may have an interest in the proceeding since, with the exception of the claims of the New York Stock Exchange and the Special Trust Fund of the New York Stock Exchange (a trust established under the Constitution of the Exchange), the uncontested claims of all known customers and general creditors of Pickard have been paid with the exception of current items.

CORPORATE STATUS OF PICKARD

3. Pickard is a corporation incorporated under the laws of Delaware with its principal place of business at 80 Wall Street, New York, New York. Its business, prior to its liquidation and the bar order issued by the Securities and Exchange Commission (discussed below), was that of a stock broker and investment adviser. A copy of its charter is attached as Exhibit C.

4. Pickard registered with the Securities and Exchange Commission as a broker-dealer on March 13, 1962 and as an investment adviser on November 24, 1964. It was a member of the National Association of Securities Dealers, Inc. and a member firm of both the New York and American Stock Exchanges.

5. On November 14, 1968, the Securities and Exchange

Commission entered an order revoking Pickard's broker-dealer and investment adviser registrations, thereby preventing it from continuing to do business in the activities for which it had been formed. On October 24, 1968, the Securities and Exchange Commission forever barred the two principal officers and stockholders of Pickard, John Sackville-Pickard and Peter Sackville-Pickard, from being associated with a broker-dealer or acting as investment advisers. Lesser sanctions were imposed upon Joseph V. Shields, Jr., the executive vice-president and the third substantial stockholder of Pickard.

CIRCUMSTANCES GIVING RISE TO THE LIQUIDATION

6. Pursuant to Rule 418 of the Rules of the Board of Governors of the New York Stock Exchange*, member firms carrying accounts of customers are required to subject themselves to unannounced annual audits of their affairs by independent public accountants. The accountants, in turn, are required to report the financial condition of such member firms to the Exchange in response to a questionnaire. On September 29, 1967, Haskins & Sells, Pickard's independent public accountants, began a review of Pick-

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* - The text of Rule 418 is as follows:

> "Each member organization doing any business with others than members and member organizations is required to have an annual audit of its affairs conducted, in accordance with the audit regulations of the Exchange by independent public accountants at a date to be selected by such accountants without prior notice to the member organization, and to have such accountants prepare an answer to the financial questionnaire of the Exchange based upon such audit."

ard's books and records for the purpose of reporting the financial condition of Pickard as of September 30, 1967. Their report was due on October 30, 1967.

7. Haskins & Sells was unable to complete their audit within the 30-day period allowed. Extensions were granted by the Exchange through December 11, 1968, and thereafter refused.

8. In January 1968, Haskins & Sells orally reported to the Exchange that they were unable to perform their audit because of serious deficiencies and inaccuracies in the books and records of Pickard. The deficiencies and inaccuracies are stated in detail in a report of Haskins & Sells, rendered without opinion and filed with the Exchange in May 1968, reporting conditions as of September 30, 1967. A copy is attached, Exhibit D. These conditions were corroborated by Exchange Examiners assigned to Pickard, in late January and early February 1968, to investigate the situation.

9. Because of the conditions found at Pickard, the Exchange, on February 9, 1968, ordered Pickard to restrict its business with customers so as not to accept any orders from them which would require them to deliver cash or securities to Pickard in order to complete their transactions; no orders were to be accepted which required customers to deliver cash or securities to Pickard. Approximately one week thereafter, Pickard was restricted still more. Only transactions constituting liquidations of existing securities positions were to be accepted. Pickard agreed to these restrictions. On February 13, 1968, to assist it in correcting the deficiencies and inaccuracies in its books, and to make them current, Pickard entered into an agreement with the Exchange

by which it was able to obtain assistance from employees of the Exchange in this endeavor (copy attached, Exhibit E).

10. Pursuant to the agreement, the Exchange assigned a number of its employees to Pickard to work on Pickard's books and records. As it developed, however, Pickard's books and records were in such poor state as to make it impossible to prepare a meaningful statement of Pickard's financial condition until October 9, 1968. The statement, prepared with the assistance of Haskins & Sells but unaudited, shows Pickard's financial condition as of August 2, 1968. A copy is attached, Exhibit F. It is to be discussed at paragraph 19, below.

11. The work with Pickard's books and records uncovered evidence of wrongdoing and violations of applicable law by certain of Pickard's officers and employees. Investigations of these wrongful acts were begun by the Exchange, leading to the filing of charges with the Board of Governors of the Exchange. After a hearing on August 7, 1968, which the persons named below attended, the Board of Governors made the following findings and ordered the following sanctions affecting the principal officers and stockholders of Pickard:

(a) John Sackville-Pickard and Peter Sackville-Pickard, respectively President and Vice President of Pickard, were found to have withdrawn, directly or indirectly, in excess of $650,000 of Pickard's funds without the knowledge of the other officers and directors of Pickard. The Messrs. Pickard were found to have participated in violations of Exchange rules respecting minimum capital, margin, segregation of securities and maintenance

of books and records, and to have made misstatements to the Exchange. John Sackville-Pickard and Peter Sackville-Pickard were expelled as allied members of the Exchange, that is, they were forbidden to associate thereafter with any member or member organization of the Exchange.

(b) Joseph V. Shields, Jr., Executive Vice President of Pickard, was suspended from allied membership for six months as a result of his participation in the violation of Exchange rules respecting minimum capital, margin, segregation of securities and maintenance of books and records.

12. The Securities and Exchange Commission initiated public proceedings of its own, on August 5, 1968, against John Sackville-Pickard, Peter Sackville-Pickard, Joseph V. Shields, Jr., a number of other Pickard employees, and Pickard & Company, Incorporated. The proceedings are discussed below, at paragraphs 25-27.

PICKARD'S INABILITY TO PAY CREDIT BALANCES OR DELIVER SECURITIES TO ITS CUSTOMERS

13. It appeared in March, and more clearly in April of 1968, that Pickard lacked sufficient liquid resources and free securities to pay and deliver to its customers the monies and securities it owed to them. Customer credit balances, that is, money owed by Pickard to customers on demand, substantially exceeded its liquid assets. At the same time, Pickard had substantial bank loans which were secured by securities pledged by Pickard, many of which were customers' securities. These loans were payable on demand by the banks and Pickard was not then in a position to meet any such demand and prevent liquidation of the

pledged securities by the banks. Unless outside sources of funds could be made available to Pickard, a complete collapse of Pickard appeared to be imminent, with concomitant substantial loss to its customers.

14. One possible source of such funds was the Special Trust Fund of the Exchange, a trust established pursuant to the provisions of Article XIX of the Constitution of the Exchange. The Trustees of the Fund, in their discretion, had the authority to provide "direct or indirect assistance to customers of a member, member firm or member corporation threatened with loss of their money or securities because such member, member firm or member corporation, in the opinion of the Trustees of the Special Trust Fund, is insolvent or is in such financial condition that he or it may be unable without assistance to meet his or its obligations to such customers. . .." An agreement was offered to Pickard and its voting stockholders pursuant to which the Special Trust Fund might make certain of its funds available to Pickard. Pickard and all of its voting stockholders, on or about May 16, 1968, entered into such an agreement with the Exchange (copy attached, Exhibit G). The subordinated lenders of Pickard were given notice in the form of copies of the agreement. Although they did not enter into the agreement, they also did not object to it, and they substantially acquiesced as to the relationship established by the agreement and the liquidation of Pickard that followed.

15. Under the Agreement of May 16, 1968, Pickard agreed, upon the first use by the Special Trust Fund of its monies, to the appointment by the Exchange of a Liquidator to take control of the

property and business of Pickard for the purpose of liquidating its business. Pickard agreed to pay the expenses of the liquidation, including the reasonable compensation of the Liquidator and of the employees of the Exchange assisting in the liquidation. The Liquidator was empowered to retain independent public accountants, legal counsel and other agents and assistants, to assert, collect and settle claims, to pay claimants, and to take other steps necessary or appropriate to liquidate the business of Pickard in accordance with good business practice. To implement the agreement, Pickard and each of its voting stockholders executed a power of attorney (Annex B to Exhibit G) to be construed in the "broadest possible manner", giving the Liquidator all powers which the signatories could have exercised.

16. On May 21, 1968, with the first use of Special Trust Fund monies, the Agreement of May 16, 1968 went into effect. I was appointed by the Exchange as the Liquidator of Pickard.

CONDUCT OF THE LIQUIDATION UNDER THE MAY 16 AGREEMENT

17. Pickard's Books and Records:

Pickard's books and records still required considerable work in order that all claimants could be properly identified and paid and sums owed to Pickard be ascertained and collected. Pursuant to the Agreement of May 16, 1968, I borrowed from the Exchange the skilled personnel necessary for this work. They, in cooperation with Haskins & Sells, accomplished the task to the extent it was possible to do so. Three statements of financial conditions were prepared; a statement dated October 9,

1968 reporting Pickard's financial condition as of August 2, 1968; a statement dated December 13, 1968 reporting Pickard's financial condition as of November 14, 1968, and a statement dated March 18, 1969, reporting Pickard's financial condition as of February 28, 1969. Copies of the statements are attached, Exhibits F, H and I respectively.

18. Payment of Customers:

A. On May 21, 1968, the Special Trust Fund deposited $200,000 with Pickard's banks, as cash collateral, to secure the banks in place of securities that Pickard owed to customers and other brokers and that had formed part of the collateral Pickard had pledged, and to permit the release of such securities. In June 1968, the cash collateral deposited by the Special Trust Fund was increased to $307,000. It remained at that level until January 1969. Pursuant to agreement with each of the banks, the Special Trust Fund was to become the assignee of each bank's claim against Pickard to the extent such bank found it necessary to realize upon any of the cash collateral deposited by the Special Trust Fund in order to discharge all or part of Pickard's obligation to it.

B. On May 31, 1968, the Special Trust Fund deposited $100,000 in a special bank account at Bankers Trust Company, to be used by the Trustees to pay the credit balances owed by Pickard to its customers. In the case of each payment, the Special Trust Fund received an assignment of the customer's claim against Pickard in the amount of the payment. By July 31, 1968, the Special Trust Fund had paid Pickard's customers, discharging Pickard's debt to them, in the

amount of approximately $100,000.

C. As of the present, all of Pickard's known customers and general creditors (save the Exchange and the Special Trust Fund) have been paid in full with the exception of current items and a small number of contested claims.

THE FINANCIAL CONDITION OF PICKARD

10. The unaudited Financial Statement rendered as of August 2, 1968 (Exhibit F) indicates that Pickard was then, and for some time before had been, insolvent. Total liabilities, approximately $3,300,000, exceeded total assets, approximately $2,200,000, giving rise to a deficit of some $1,100,000. Unless Pickard's various claims against customers, former officers and directors, employees and Pickard's bonding company were to result in a significant realization of funds, the size of the deficit indicated that none of the subordinated lenders, whose claims exceeded $1,000,000, and none of the stockholders, could expect to be repaid any portion of the sums they had lent to, or invested in, Pickard.

20. The Statements rendered as of November 14, 1968 and as of February 28, 1969, Exhibits H and I respectively, show substantial reductions in Pickard's assets and liabilities. The size of the deficit, however, and its consequence to the subordinated lenders and stockholders, did not change materially. It will be some time before the likelihood of substantial recoveries upon the claims asserted by Pickard may be fairly estimated. The claims, suits and arbitration proceedings are listed and are

briefly described in Exhibit J.

PICKARD'S INDEBTEDNESS
TO THE NEW YORK STOCK EXCHANGE
AND TO THE SPECIAL TRUST FUND

21. The Special Trust Fund had discharged Pickard's debts to its customers to an extent totalling $99,650. With each payment, the Special Trust Fund received an assignment from the customer it had paid and became subrogated to his rights. On February 19, 1969, upon demand by the Special Trust Fund, Pickard paid the Fund $99,650 representing the net amount paid by the Fund to customers of Pickard.

22. In January 1969, Pickard's banks foreclosed on the collateral they held. To cover the deficiencies remaining after foreclosure of the collateral pledged by Pickard, the banks foreclosed on the cash collateral deposited by the Special Trust Fund, to an extent aggregating $168,933. The Special Trust Fund received assignments from, and became subrogated to, the rights of the banks as creditors of Pickard. Pickard has been unable to comply with a demand by the Fund for payment of this sum, and the total amount of $168,933 remains due and payable to the Special Trust Fund.

23. The Agreement of May 16, 1968 among Pickard, the voting stockholders of Pickard and the Exchange provided that Pickard would reimburse the Exchange for my salary and the salaries of other Exchange employees directly assisting in the liquidation, to the extent that our time was devoted to Pickard (see Exhibit G, para. VII). The total of such salary and other expenses incurred by the Exchange through February 28, 1969 was $316,318, of which

$269,648 was recovered by the Exchange out of the proceeds of a sale of Pickard's membership in the New York Stock Exchange, leaving a balance due of $46,670 which Pickard has been unable to pay.

24. In summary, Pickard is indebted to the Special Trust Fund in the amount of $168,933 and to the New York Stock Exchange in the amount of $46,670. The Special Trust Fund stands in the right of Pickard's banks, since the Fund discharged Pickard's obligation to its bank-creditors. The debt to the Exchange arose as a necessary expense of liquidation, without which Pickard's books and records could not have been brought to a state of reasonable accuracy, creditors could not have been paid, and claims could not have been asserted in behalf of Pickard.. Both the Exchange and the Special Trust Fund claim as general creditors.

THE SECURITIES AND EXCHANGE COMMISSION PROCEEDINGS AGAINST PICKARD

25. I have previously discussed the disciplinary proceedings brought against certain of Pickard's officers by the New York Stock Exchange. On August 5, 1968, subsequent to my appointment as Liquidator, the Securities and Exchange Commission initiated public proceedings against Pickard and a number of its officers and employees based upon acts committed prior to the onset of the liquidation.

26. The complaint (copy attached, Exhibit K) charges the respondents with wilfully violating, and wilfully aiding and abetting violations of, the securities laws, in numerous ways. Respondents are charged with selling unregistered stock, with manipulation of the market, with effecting transactions through dummy accounts, with making untrue and deceptive and misleading statements, with unlawfully extending and maintaining credit to customers in violation of Regulation T, with failing to keep accurate current records and accounts, with wrongfully commingling customers' securities without their prior consent and wrongfully hypothecating such securities, with failing to file a certified report of Pickard's financial condition for the calendar year 1967 within the time required, and with other violations of the Securities Laws.

27. The charges filed by the Securities and Exchange Commission resulted in the following dispositions:

A. With the approval, or acquiescence, of all of Pickard's voting stockholders, officers and directors, a settlement was negotiated on behalf of Pickard with the staff of the Securities and Exchange Commission, and approved by the Commission (see Stipulation and Consent and Offer of Settlement, Exhibit L). On November 14, 1968, the Commission ordered that the broker-dealer and investment adviser registrations of Pickard be revoked (copy of order attached, Exhibit M). Subsequently, the broker-dealer and investment adviser registrations of Pickard in the several states in which it did business were withdrawn or revoked.

B. On October 24, 1968 the Securities and

Exchange Commission issued findings and a bar order against respondents John Sackville-Pickard and Peter Sackville-Pickard (copy attached, Exhibit N). It was ordered that "John Sackville-Pickard and Peter Sackville-Pickard be, and they hereby are, barred from being associated with a broker-dealer and from being an investment adviser."

C. Disciplinary action was taken, as well, against Joseph V. Shields, Jr., Executive Vice President and a Director of Pickard, and against other employees of Pickard. (Copies of the relevant orders are attached. Exhibits O, P and Q.)

THE PRESENT PARTIES AND INTEREST

28. Pickard, as a result of its insolvent financial position and of the bar orders issued by the Securities and Exchange Commission against it and its principal officers, can not again become active as a broker-dealer or investment adviser. Pickard's remaining assets, to which the parties presently in interest must look for payment of their claims, are the claims, lawsuits and arbitration proceedings asserted by Pickard (see Schedule, Exhibit J). Parties with claims against those assets are:

A. General Creditors:

(1) The plaintiff, the New York Stock Exchange, to the extent of $46,670;

(2) The Special Trust Fund, to the extent of $163,933.

B. Subordinated Creditors:

(3) The subordinated loans of four of the subordinated lenders of Pickard matured at different dates in early March, 1968, but could not be repaid to them on their demand because of the doubt that then existed as to Pickard's solvency. By agreement, the subordinated accounts of these creditors were placed in escrow with appointed custodians, and so remain presently. The aggregate value of these escrows as of the dates of the opening of the escrows, in mid-March 1968, was $293,249. Pickard and the four subordinated lenders are presently involved in arbitration proceedings and litigation as to these escrows.

(4) Subordinated lenders of Pickard and debenture holders had claims aggregating, as of February 28, 1969 $802,867 (see Schedule, Exhibit A).

C. Stockholders:

(5) The voting and nonvoting stockholders of Pickard, if assets prove sufficient, may have a claim to the extent of their ownership interests. A schedule of stock ownership is attached, Exhibit B.

POSITION OF THE LIQUIDATOR WITH RESPECT TO THESE PROCEEDINGS

29. The purposes for which I took office have been accomplished. The books and records of Pickard have been put in order, insofar as that was practical, Financial loss for the customers of Pickard has been averted. All claims of Pickard showing promise of significant recovery have been asserted.

30. Because of the reasons stated in this affidavit, I ask that the Court relieve Pickard of the duty to file and serve an Answer. By giving the various parties in interest notice and an opportunity to present their views, the Court will be fully apprised of the position any such party might wish to take.

31. No previous application for this relief has been made.

Lloyd W. McChesney

Lloyd W. McChesney

Sworn to before me this
day of March, 1969

John P. Foynes

JOHN P. FOYNES
Notary Public, State of New York
No. 31-1294125
Qualified in New York County
Commission Expires March 30, 1969

Exhibit B to Bishop Affidavit—February
Agreement between Pickard and
New York Stock Exchange

AGREEMENT made as of the 13th day of February, 1968, between PICKARD & COMPANY, INCORPORATED ("Pickard Corporation") and NEW YORK STOCK EXCHANGE ("the Exchange").

WHEREAS, Pickard Corporation has decided to transfer or deliver as promptly as possible all of its customers' accounts in accordance with the instructions of such customers and, in order to accomplish this objective, must, among other things and insofar as practicable, establish its books and records on a current, complete and accurate basis; and

WHEREAS, Pickard Corporation has solicited the assistance of the Exchange in this connection and, in particular, has requested the Exchange to supply additional personnel;

NOW, THEREFORE, in consideration of the premises,

Pickard Corporation hereby agrees that Pickard Corporation, and not the Exchange, shall be solely responsible and liable for all acts and/or omissions of any Exchange employee heretofore or hereafter performing services for Pickard Corporation to the same

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extent as though such services were performed by an employee of Pickard Corporation, and Pickard Corporation hereby agrees to indemnify, hold harmless and defend the Exchange and each of its officers, governors and employees from and against any and all suits, proceedings at law or in equity, and any and all liability, loss or damage, including reasonable attorneys' fees, arising out of or in connection with any act or omission by any Exchange employee performing any such services for Pickard Corporation.

IN WITNESS WHEREOF, the undersigned have executed this Agreement as of the day and year first above written.

PICKARD & COMPANY, INCORPORATED

By _____
John Sackville-Pickard
President-Director

_____
Peter Sackville-Pickard
Vice President-Secretary-
Treasurer-Director

_____
Joseph V. Shields, Jr.
Executive Vice President-
Director

Warren C. Crunden
Vice President-Director

Albert E. Posener
Albert E. Posener
Vice President-Director

Hayes A. Noel, Jr.
Assistant Vice President-
Director

John A. Schwarz, Jr.
Vice President-Director

NEW YORK STOCK EXCHANGE

By

Exhibit C to Bishop Affidavit—May Agreement between Pickard and New York Stock Exchange

AGREEMENT dated as of May 16, 1968, between the NEW YORK STOCK EXCHANGE (the "Exchange"), PICKARD & COMPANY, INCORPORATED ("Pickard"), and one or more voting and nonvoting stockholders of Pickard, debenture-holders of Pickard, subordinated lenders of cash and/or securities to Pickard and customers of Pickard subordinating their claims against Pickard (each of such stockholders, debenture-holders, lenders and customers, whether or not signatories hereto, being hereinafter referred to as a "Participant");

WHEREAS, Pickard has decided to transfer or deliver all of its customers' accounts and has solicited the assistance of the Exchange in this connection;

WHEREAS, a portion of the Special Trust Fund authorized by Article XIX of the Constitution of the Exchange (the "Fund") may, under certain circumstances and at the absolute discretion of the Trustees of such Special Trust Fund (the "Trustees"), be hereafter used for the purpose of providing direct or indirect assistance to customers of Pickard threatened with loss of their money or securities because of the financial condition of Pickard;

NOW, THEREFORE, in consideration of the premises and of the mutual covenants herein contained, the parties hereto agree as follows:

I. Pickard agrees: 7

A.) That no new commitments by or on behalf of Pickard will be made without the prior written consent of the Exchange.

B.) That no new customer account will be opened or accepted by Pickard, and no securities transactions other than liquidating transactions will be made in firm or any customer account, without the prior written consent of the Exchange.

C.) That it will continue to ask for customer's instructions and will transfer its customers' accounts in accordance with such instructions as soon as practicable.

II. Each of the signatories hereby agrees that, in the event the Trustees loan any cash, securities or other property to Pickard, or expressly guarantee any obligation of Pickard to any one or more of its creditors, or pay all or any portion of any obligation of Pickard to any one or more of its creditors (any such loan, guarantee, or payment to be made only in the absolute discretion of the Trustees), any and

all such loans shall be repaid the Trustees by Pickard in full, any and all such guarantees shall be discharged in full and any amounts expended by the Trustees pursuant to any such guarantee shall be repaid the Trustees by Pickard in full, and the total amount of any and all such payments by the Trustees to creditors of Pickard shall be repaid the Trustees by Pickard in full, before any payment is made on any claim of any of the undersigned against Pickard for the return of capital, or for the return of property and/or cash loaned to Pickard, on a subordinated basis, or for interest thereon, or for salary or other compensation (other than such salary or other compensation as may be agreed to by the Exchange. In the event any payment is made to, or for the benefit of, any of the undersigned, on or in satisfaction of any such claim, before repayment in full of any and all loans as may be made by the Trustees to Pickard has been completed, or while any guarantee by the Trustees remains outstanding or before repayment in full of any and all amounts expended by the Trustees pursuant to any such guarantee, or before repayment in full to

the Trustees of any and all payments made by them to creditors of Pickard, the undersigned to or for the benefit of whom any such payment is made (and his or her heirs, executors, administrators, successors and assigns) hereby agrees that, forthwith on demand, he shall return the full amount of such payment, or the proceeds thereof, to Pickard for the benefit of creditors of Pickard other than the undersigned.

III. Notwithstanding any provisions of this Agreement, and whether or not Pickard has complied or is complying therewith, the Chairman of the Board of Governors of the Exchange and the Board of Governors may at any time exercise any power or powers under the Constitution of the Exchange (including Article XIII thereto) or the Rules of the Board of Governors.

IV. There is hereby appointed a consulting committee (herein the Consulting Committee) composed of each of the Directors of Pickard, namely: John Sackville-Pickard, Peter Sackville-Pickard, Joseph V. Shields, Jr., Hayes A. Noel, Jr. and John A. Schwarz, Jr. Each

member of the Consulting Committee agrees that he will not resign as a Director of Pickard without the prior written consent of the Exchange and will be available during normal business hours to assist and cooperate with the Liquidator hereinafter referred to. It is agreed that the Consulting Committee shall meet at the call of the Liquidator or a majority of its members and that the Liquidator, or his personal representative, shall attend each meeting of the Consulting Committee of which the Liquidator is given reasonable notice. The Liquidator shall keep the Consulting Committee informed as to all questions of policy affecting the liquidation of the business of Pickard and shall consult with the Consulting Committee with respect to such matters of policy.

During such period as a member of the Consulting Committee is available to the Liquidator during normal business hours, such member shall be paid a salary by the Liquidator at the rate of $12,000 per annum in the case of each of Messrs. Shields, Noel and Schwarz (plus, in the case of Mr. Shields, he shall continue to receive his usual commissions on the Sincere and Company account so long as that account is continued with Pickard), and at the

rate of $16,000 per annum in the case of Peter Sackville-Pickard and at the rate of $18,000 per annum in the case of John Sackville-Pickard; provided, however, that the Liquidator may at any time terminate the requirement that any member of the Consulting Committee shall continue to be available to him, in which event the salary to such member shall terminate, or may require John and/or Peter Sackville-Pickard to continue to be available only during a specific number of hours each day or week, in which event the salary of such member shall be at an hourly rate which, in the opinion of the Liquidator, is equivalent to the annual rate of salary for such member specified above.

A majority of the members of the Consulting Committee shall have full power and authority on behalf of Pickard, at any time and from time to time (a) to accept for and on behalf of Pickard any loan of money to Pickard which may at any time in the future be made by the Trustees, any such loan to be payable on demand, to bear interest at the rate of 6% per annum, and to be evidenced by, and subject to all the terms and conditions of, a note substantially in the form attached hereto as Annex A,

and to execute on behalf of Pickard and deliver any such note (any such loan of money being hereinafter referred to as a "Loan"); and (b) to enter into, execute and deliver on behalf of Pickard any agreement or agreements or power of attorney supplemental to the Power of Attorney attached hereto as Annex B, or any other instrument required by the Exchange and deemed appropriate by such Consulting Committee relating to this Agreement, the business of Pickard or the liquidation thereof.

In the event that any amount is expended by the Trustees pursuant to any guarantee by the Trustees of any obligation of Pickard, or in the event that any payment is made by the Trustees to any creditor of Pickard, then, upon request by the Exchange, Pickard shall execute and deliver to the Trustees a note substantially in the form attached hereto as Annex A, in the full amount of any such expenditure or payment.

V. Pickard and each Participant hereby agrees that the proceeds of any Loan received by Pickard from the Trustees shall be placed in a special account

with a member of the New York Clearing House other than any bank to which Pickard is indebted and that the balance in such special account from time to time shall be used by Pickard solely for one or more of the following purposes:

i.) to make full or partial payment of any loan or loans due any bank or banks secured by Pickard's customers' securities, in order to secure the release of such securities; provided, however, that for the purpose of obtaining the release of customers' securities pledged to secure any loan, Pickard shall not pay an amount in excess of the then market value of the securities sought to be released from such loan without first obtaining the written consent of the Exchange;

ii.) to pay any one or more credit balances owed to any Pickard customer as a customer;

iii.) to pay any amount or amounts heretofore received from other brokers in connection with the loan by Pickard of customers' securities, in order to obtain the return of such securities;

iv.) to pay any amount or amounts to any other broker representing the cost of securities purchased by Pickard for customers, which securities have not been received from such other broker or paid for by Pickard;

v.) to purchase, if necessary, any security or securities owed to any customer of Pickard;

vi.) to pay any other creditor or creditors of Pickard (other than with respect to any proprietary account) if it appears that such payment is necessary or advisable to protect customers of Pickard, including customers whose accounts have been paid or delivered to others.

VI. From and after the date on which the first Loan, or the first guarantee by the Trustees of any obligation of Pickard, or the first payment by the Trustees of all or any portion of any obligation of Pickard to any of its creditors, is

made, the Exchange shall have the right to appoint such person then in its employ as it may choose as Liquidator of the business of Pickard. It is agreed that prior to the close of business on Monday, May 20, 1968, the Trustees will not make any Loan to Pickard, or guarantee any obligation of Pickard, or make any payment of all or any portion of any obligation of Pickard to any of its creditors, without first obtaining the consent of not less than a majority of the members of the Consulting Committee, and that after such date any such Loan or guarantee or payment to creditors by the Trustees may be made without the consent of the Consulting Committee or any member thereof, unless the Consulting Committee is successful in satisfying the Exchange that no such Loan, guarantee or payment to creditors by the Trustees should then be made. Any appointment of a Liquidator shall be evidenced by a written notice by the Exchange addressed to Pickard and delivered to the principal office of Pickard.

Pickard and each of the Participants agrees, coincident with his execution of this Agreement and

at the request of the Exchange, to execute a general power of attorney substantially in the form of Annex B attached hereto. Pickard and each of the Participants who signs this Agreement further agrees, following the appointment of the Liquidator by the Exchange as herein provided, (i) to cooperate fully with the Liquidator, (ii) to execute all such additional powers of attorney as may be prescribed by the Exchange in favor of any person then serving as Liquidator, and (iii) except as directed by the Liquidator, to refrain from doing any act or thing, on behalf of Pickard, which the Liquidator is authorized to do by any such power of attorney.

The Liquidator shall serve as such until such time as the Exchange shall terminate all powers of attorney executed by Pickard or any Participant in favor of the Liquidator, by written notice to Pickard and each such Participant delivered to the principal office of Pickard.

If any person appointed by the Exchange as Liquidator of the business of Pickard shall resign or be

unable to serve, his successor shall also be a person designated by the Exchange in a written notice by the Exchange addressed to Pickard and delivered to the principal office of Pickard.

VII. Pickard agrees that, on request by the Exchange, it will reimburse the Exchange the full amount of any reasonable compensation paid by the Exchange to the Liquidator or to any other Exchange employee with respect to that period of time while the Liquidator or such other Exchange employee is engaged in assisting Pickard or in the liquidation of its business.

Whenever the Liquidator is a person other than an employee of the Exchange, Pickard agrees to compensate him in such amount as may be agreed by the Consulting Committee named in Section IV hereof and the Exchange.

VIII. Immediately following his appointment by the Exchange, the Liquidator shall take control of the business and property of Pickard for the

purpose of liquidating the business of Pickard and shall proceed as follows in connection with the liquidation:

i.) he shall promptly take such steps as he may deem practicable to reduce Pickard's operating expenses and to dispose of Pickard's saleable assets;

ii.) he shall have power to retain independent public accountants, consultants, counsel and other agents and assistants and shall have power to augment and reduce or eliminate the staff of Pickard;

iii.) he shall, as soon as practicable, assert and collect or settle all claims and rights of Pickard;

iv.) he shall pay any claim against Pickard considered by him to be a valid claim of any Pickard customer or other creditor;

v.) he shall take such other steps as he deems necessary or appropriate to liquidate the business of Pickard.

It is agreed that, consistent with the duty of the Liquidator to effect a fair and orderly

liquidation of the business of Pickard to enable prompt settlement with its customers, the Liquidator shall act in accordance with what he deems to be good business practice.

IX. Neither the Liquidator, any Trustee, nor any party to this Agreement, shall acquire by this Agreement or by anything done pursuant to it any interest in the business or assets of Pickard other than the interests, powers and rights which are specifically granted by this Agreement.

Neither the Liquidator, the Exchange, nor any Trustee, shall by reason of this Agreement, or of anything done pursuant to it, be or become a partner of, or joint adventurer with, Pickard or any other of the undersigned, and neither this Agreement nor anything done pursuant to it shall create a partnership, joint venture or other association between any two or more of the parties to this Agreement.

Neither the Liquidator, nor Pickard, nor any Participant, nor any other person, shall have any right of recourse or indemnity against the Exchange, the Trustees, the Fund, or any member, allied member, governor, officer or employee of the Exchange in respect of any loss, liability, claim or damage sustained as a result of the execution or performance of this Agreement or any action taken or failure to act in connection therewith. Nothing herein shall be deemed to affect any right of indemnification the Liquidator may have under Section 12 of Article III of the Constitution of the Exchange.

No person other than a party to this Agreement shall have any rights under it.

This Agreement shall be deemed to be a contract made under, shall be construed in accordance with and governed by, the law of the State of New York and shall be binding upon each of the parties hereto and their respective heirs, executors, administrators, successors and assigns.

This Agreement may be signed in any number of

counterparts, no one of which need contain the signatures of all parties signing this Agreement, and as many of such counterparts as shall together contain the signatures of all of the parties who sign this Agreement shall constitute one and the same instrument.

This Agreement shall be effective as to each individual party signing this Agreement immediately upon the execution of this Agreement by such party and shall continue in effect as to such party whether or not executed by all other individuals who are within the definition of the term "Participant" as used herein.

This Agreement shall remain in effect notwithstanding the sale or other disposition by any voting stockholder of Pickard of his membership in the Exchange.

While not executed by or on behalf of the Trustees of the Special Trust Fund of the Exchange, it is agreed that such Trustees shall have all the

benefits hereof as though they were parties hereto.

IN WITNESS WHEREOF, each of the undersigned has executed this Agreement or will cause the same to be executed on his behalf as of the date first above written.

NEW YORK STOCK EXCHANGE

By _____
Vice-President

PICKARD & COMPANY, INCORPORATED

By _____
President

Attest:

_____
Secretary

HOLDERS OF VOTING STOCK

_____
John Sackville-Pickard

_____
Peter Sackville-Pickard

_____
Joseph V. Shields, Jr.

_____
Albert E. Posener

_____
Hayes A. Noel, Jr.

_____
John A. Schwarz, Jr.

HOLDERS OF NONVOTING STOCK

_____
Francis G. Brewer

_____
John Mackey

C. Fink Fischer

J. Frank Thompson

Ruby Grice Brewer

Beulah G. Hall

Statton K. Ours

Donald B. Pierson

Jean B. Fischer

George F. Wiechen

Anthony F. Fennelli, Jr.

Helen M. Shields

Gerrit L. Lansing

_____
Nelson L. Ott

_____
Alison C. Sackville-Pickard

_____
Audrey C. Sackville-Pickard

_____
Thomas H. Magness, Jr.

SUBORDINATED LENDERS

_____

_____

_____

_____

_____

_____

_____

CUSTOMERS SUBORDINATING CLAIMS

_____

_____

_____

_____

_____

_____

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

On this 17th day of May, 1968, before me, a notary public within and for said County, personally appeared JOHN SACKVILLE-PICKARD, who, being by me duly sworn, did depose and say that he is the President of PICKARD & COMPANY, INCORPORATED, a corporation; that he knows the seal of said corporation; that the seal affixed to the foregoing instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation; and that he signed his name thereto by like order.

Notary Public

MORTIMER GERBER
Notary Public, State of New York
No. 41-1402160 Queens County
Term Expires March 30, 1969

ANNEX A

AGREEMENT between the Trustees of the Special Trust Fund of the New York Stock Exchange (hereinafter called the "Lender") and PICKARD & COMPANY, INCORPORATED, of 55 Broad Street, New York, N. Y. (hereinafter called the "Corporation"). Subject to the terms and conditions hereinafter set forth, the Corporation promises to pay to the Lender or assigns on demand, at the principal office of the Lender, $, and interest thereon at the rate of 6% per annum from the date hereof payable on the last day of each calendar quarter.

The Lender agrees for itself and assigns (a) that the obligations of the Corporation under this Agreement with respect to the payment of principal and interest are and shall be subordinate in right of payment and subject to the prior payment or provision for payment in full of all valid claims of all present customers of the Corporation as customers of the Corporation and (b) that the holder hereof shall not be entitled to participate or share, ratably or otherwise, in the distribution of the assets of the Corporation until all claims of all present customers of the Corporation as customers of the Corporation have been fully satisfied, or provision has been made therefor.

The Corporation agrees that it shall not pay any claim of any stockholder or debenture holder of the Corporation as such stockholder or debenture holder, or any claim of any subordinated lender of cash and/or securities to the Corporation as such subordinated lender, or any claim of any customer of the Corporation who has subordinated such claim to the claims of other creditors of the Corporation, until the payment in full of the obligation of the Corporation hereunder, together with accrued interest thereon.

Default in the payment of interest shall not accelerate the maturity of the obligation evidenced hereby and payment of the same shall remain subordinate as herein set forth.

This agreement shall be binding upon the parties hereto and their respective successors and assigns.

This instrument embodies the entire agreement between the parties hereto and shall be construed in accordance with and governed by the laws of the State of New York.

IN WITNESS WHEREOF, the parties hereto have set their hands and seals this day of , 196 .

PICKARD & COMPANY, INCORPORATED

By_____

TRUSTEES OF THE SPECIAL TRUST FUND

By_____

KNOW ALL MEN BY THESE PRESENTS that effective from and after delivery to the principal office of Pickard & Company, Incorporated (the "Corporation") at 55 Broad Street, New York, New York, of a written notice from the New York Stock Exchange (the "Exchange") designating the person appointed by the Exchange to serve as Liquidator of the business of the Corporation in accordance with the Agreement dated as of May 16, 1963 between the Exchange, the Corporation and various Participants as defined therein (the "Agreement"), the Corporation, and each of the other signatories hereto, in whatever capacity he may act, in order more fully to carry out the terms of the Agreement, by these presents does make, constitute and appoint the person so appointed by the Exchange and any successor thereto appointed by the Exchange as provided in the Agreement (hereinafter referred to as the "Agent") the true and lawful attorney and agent of and for the Corporation and each of the other signatories hereto, and in the name, place and stead of each of them or in the Agent's own name or in his name as Liquidator to do any or all of the following acts and to exercise any or all of the following powers on behalf of the Corporation or any other signatory hereto (except so as to change the obligations of the Participants under the Agreement as with respect to the Exchange) and each of the signatories hereto intends that the same be construed in the broadest possible manner and be not limited to their strict technical or legal meaning.

1. General business. (a) To the extent that an agent is permitted by law thus to act for a principal, to discharge and to perform any duty or liability and also to exercise any right, power, privilege or option which the Corporation has, or claims to have, under any contract or agreement, and to enforce the terms of any such contract or agreement by action, proceeding or otherwise, as the Agent shall think to be desirable or necessary;

(b) to exercise in person or by proxy or to enforce by action, proceeding or otherwise, any right, power, privilege or option which the Corporation has, or any signatory hereto on behalf of the Corporation has, as the holder of any bond, share, or other security or instrument of similar character;

(c) to carry out, to continue, to modify, to renegotiate, to extend and to terminate any contractual arrangements made with any person, firm, association or corporation whatsoever by the Corporation or any signatory hereto on behalf of the Corporation prior to the execution or effectiveness of this power of attorney;

(d) to demand, to receive or to obtain by action, proceeding or otherwise, any money, or other thing of value to which the Corporation, or any signatory hereto on behalf of the Corporation, is or may become, or may claim to be entitled as the proceeds of any business operation of the Corporation, to disburse or to utilize any thing so received in the liquidation of the business of the Corporation, and to reimburse himself for any expenditures properly made by

him in the execution of the powers conferred upon him in this power of attorney; and

(e) to pay claims of customers and other creditors of the Corporation, and to take all action and do all things necessary or deemed by the Agent appropriate or desirable in this connection, including, without limitation, purchasing or redeeming from loan or pledge any securities necessary to enable the delivery of customer accounts, and selling securities to close out open positions.

2. Banking Transactions. (a) To continue, to modify and to terminate any deposit account, or other banking arrangement made by the Corporation or by any signatory hereto on behalf of the Corporation prior to the execution or effectiveness of this power of attorney;

(b) to open either in the name of the Agent alone, or in the name of the Corporation alone, or in both their names jointly or otherwise, a deposit account of any type with any banker or in any banking institution selected by the Agent, to hire such safe deposit box or vault space and to make such other contracts for the procuring of other services made available by any such banker or banking institution as the Agent shall think to be desirable;

(c) to make, to sign and to deliver Corporation checks or drafts for any purpose hereunder, to withdraw by check, order or otherwise any funds or property of the Corporation deposited with, or left in the custody of, any banker or banking institution, wherever located, either before or after the execution of this power of attorney;

(d) to prepare from time to time financial statements concerning the assets and liabilities or income and expenses of the Corporation, and to deliver statements so prepared to any banker, banking institution or other person, whom the Agent believes to be reasonably entitled thereto;

(e) to receive statements, vouchers, notices or other documents from any bank or banking institution with respect to any matter in which the Corporation has, or claims to have, an interest and to act with respect thereto;

(f) to have free access at any time or times to any safe deposit box or vault to which any one or more signatories hereto, as an officer or director of the Corporation, might have access, if personally present;

(g) to borrow money by bank overdraft, or by promissory note of the Corporation given for such period and at such interest rate as the Agent shall select, to give such security out of the assets of the Corporation as the Agent shall think to be desirable or necessary for any such borrowing, to pay, to renew or to extend the time of payment of any note so given or given by or on behalf of the Corporation, and to procure for the Corporation a loan from any stock or commodity exchange, banker or banking institution by any other procedure made available by such exchange, banker or institution.

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(h) to make, to assign, to indorse, to discount, to guarantee, and to negotiate, for any and all purposes, all promissory notes, bills of exchange, checks, drafts or other negotiable or non-negotiable paper of the Corporation, or payable to the Corporation or to its order, to receive the cash or other proceeds of any such transactions, to accept any bill of exchange or draft drawn by any person upon the Corporation, and to pay it when due;

(i) to receive for the Corporation and to deal in and with any trust receipt, warehouse receipt or other negotiable or non-negotiable instrument, in which the Corporation has or claims to have an interest;

(j) to apply on behalf of the Corporation for and to receive letters of credit or travelers checks from any banker or banking institution selected by the Agent, giving such indemnity or other agreements in connection therewith as the Agent shall think to be desirable or necessary;

(k) to consent to an extension in the time of payment with respect to any commercial paper or any banking transaction in which the Corporation has an interest or by which the Corporation is, or might be, affected in any way;

(l) to pay, to compromise or to contest, taxes or assessments with respect to the Corporation or any interest therein or income therefrom and to apply for refunds in connection therewith; and

(m) to demand, to receive, to obtain by action, proceeding, or otherwise any money or other thing of value to which the Corporation is, or may become, or may claim to be, entitled as the proceeds of any banking transaction conducted by the Corporation itself, or by the Agent in the execution of any of the powers described herein, or partly by the Corporation and partly by the Agent so acting, to disburse or to utilize anything so received for purposes enumerated herein, and to reimburse himself for any expenditures properly made by him in the execution of the powers conferred upon him by this power of attorney.

3. Bonds and Shares. (a) To sell (including short sales), to exchange, to transfer, either with or without a guaranty, to release, to surrender, to hypothecate, to pledge, to revoke, create or modify a trust or to grant options concerning, to loan, to trade in, or otherwise to dispose of, any bond, share, security, instrument of similar character, commodity interest or any instrument with respect thereto, owned, or claimed to be owned, by the Corporation, by any signatory hereof on behalf of the Corporation or by any customer of the Corporation or to guaranty any signature with respect thereto;

(b) to release in whole or in part, to assign the whole or a part of, to satisfy in whole or in part, and to enforce by action, proceeding or otherwise, any pledge,

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incumbrance, lien or other claim as to any bond, share, instrument of similar character, commodity interest or any instrument with respect thereto, when such pledge, incumbrance, lien or other claim is owned, or claimed to be owned, by the Corporation or by any signatory hereto on behalf of the Corporation;

(c) to do any act of management or of conservation with respect to any bond, share, security, instrument of similar character, commodity interest or any instrument with respect thereto, owned or claimed to be owned by the Corporation, by any signatory hereto on behalf of the Corporation or by any customer of the Corporation in which the Corporation or any signatory hereto on behalf of the Corporation has or claims to have an interest, including by way of illustration, but not of restriction, power to insure against any casualty, liability or loss, to obtain or to regain possession or to protect the Corporation's interest therein by action, proceeding or otherwise, to pay, to compromise or to contest taxes or assessments, to apply for refunds in connection therewith, to consent to and to participate in any reorganization, recapitalization, liquidation, merger, consolidation, sale or lease, or other change in or revival of a corporation or other association, or in the financial structure of any corporation or other association, or in the priorities, voting rights, or other special rights with respect thereto, to become a depositor with any protective, reorganization or similar committee of the bond, share, security, other instrument of similar character, commodity interest or any instrument with respect thereto, belonging to the Corporation or to any signatory hereto on behalf of the Corporation, to make any payments reasonably incident to the foregoing, to exercise or to sell any option, conversion or similar right, to vote in person or by the granting of a proxy (with or without the power of substitution), either discretionary, general or otherwise, for the accomplishment of any of the purposes enumerated herein;

(d) to carry in the name of a nominee selected by the Agent any evidence of the ownership of any bond, share, security, other instrument of similar character, commodity interest or instrument with respect thereto, belonging, or claimed to belong, to the Corporation or any signatory hereto on behalf of the Corporation or by any customer of the Corporation;

(e) to employ, in any way believed to be desirable by the Agent, any bond, share, security, other instrument of similar character, commodity interest or any instrument with respect thereto, in which the Corporation or any signatory hereto on behalf of the Corporation has or claims to have any interest, for the protection or continued operation of any speculative or margin transaction personally begun or personally guaranteed, in whole or in part, by the Corporation or by any signatory hereto on behalf of the Corporation;

(f) to demand, to receive, to obtain by action, proceeding or otherwise, any money or other thing of value to which the Corporation is, or may become, or may claim to be entitled as the proceeds of any interest in a bond, share, security, other instrument of similar character, commodity interest or any instrument with respect thereto, or of one or more of the transactions enumerated herein, to conserve, to invest, to disburse or to utilize anything so received for

purposes enumerated herein, and to reimburse himself for any expenditures properly made by him in the execution of the powers conferred on him by this power of attorney; and

(g) to agree and contract, in any manner, and with any broker or other person, and on any terms, which the Agent may select, for the accomplishment of any of the purposes enumerated herein, and to perform, to rescind, to reform, to release or to modify any such agreement or contract or any other similar agreement made by or on behalf of the Corporation.

4. Personal Property. (a) To sell, to exchange, to convey either with or without covenants, to release, to surrender, to mortgage, to incumber, to pledge, to hypothecate, to pawn, to revoke, create or modify a trust, to grant options concerning, to lease or to sublet to others, or otherwise to dispose of any personal property, including any security, chattel or goods or any interest therein, owned or claimed to be owned, by the Corporation or by any signatory hereto on behalf of the Corporation, or in which the Corporation has an interest;

(b) to release in whole or in part, to assign the whole or a part of, to satisfy in whole or in part, and to enforce by action, proceeding or otherwise, any mortgage, incumbrance, lien or other claim, which exists, or is claimed to exist, in favor of the Corporation or any signatory hereto on behalf of the Corporation, with respect to any personal property, including any security, chattel or goods or any interest therein;

(c) to do any act of management or of conservation, with respect to any personal property, including any security, chattel or goods or to any interest therein owned, or claimed to be owned, by the Corporation or by any signatory hereto on behalf of the Corporation, or in which the Corporation has an interest, including by way of illustration, but not of restriction, power to insure against any casualty, liability or loss, to obtain or to regain possession, or to protect such property or interest therein, by action, proceeding or otherwise, to pay, to compromise or to contest taxes or assessments, to apply for refunds in connection therewith, to move from place to place, to store for hire or on a gratuitous bailment, to use, to alter, and to make repairs or alterations of any such property or interest therein;

(d) to demand, to receive, to obtain by action, proceeding or otherwise, any money or other thing of value to which the Corporation or any signatory hereto on behalf of the Corporation is, or may become, or may claim to be entitled as the proceeds of any personal property, including any security, chattel or goods or of any interest therein, or of one or more of the transactions enumerated herein, to conserve, to invest, to disburse or to utilize anything so received for purposes enumerated herein, and to reimburse the Agent for any expenditures properly made by him in the execution of the powers conferred on him by this power of attorney; and

(e) to agree and to contract, in any manner, and with any person and on any terms, which the Agent may select, for the accomplishment of any of the purposes enumerated

herein, and to perform, to rescind, to reform, to release or to modify any such agreement or contract or any other similar agreement or contract made by or or behalf of the Corporation.

5. Real Estate. (a) To sell, to exchange, to convey either with or without covenants, to quitclaim, to release, to surrender, to mortgage, to incumber, to partition or to consent to the partitioning, to revoke, create or modify a trust, to grant options concerning, to lease or to sublet, or otherwise to dispose of, any estate or interest in land owned, or claimed to be owned, by the Corporation or by any signatory hereto on behalf of the Corporation; and

(b) to release in whole or in part, to assign the whole or a part of, to satisfy, in whole or in part, and to enforce by action, proceeding or otherwise, any mortgage, incumbrance, lien or other claim to land which exists, or is claimed to exist, in favor of the Corporation or any signatory hereto on behalf of the Corporation.

6. Litigation. (a) To assert and to prosecute before any court, administrative board, department, commissioner or other tribunal, any cause of action, claim, counterclaim, offset or defense, which the Corporation has, or claims to have, against any individual, partnership, association, corporation, government, or other person or instrumentality, including, by way of illustration and not of restriction, power to sue for the recovery of land or of any other thing of value, for the recovery of damages sustained by the Corporation in any manner, for the elimination or modification of tax liability, for an injunction, for specific performance, or for any other relief and including any such cause of action, claim, counterclaim, offset or defense by the Corporation against any signatory hereto;

(b) on behalf of the Corporation to bring an action of interpleader or other action to determine adverse claims, to intervene or to interplead in any action or proceeding, and to act in any litigation as amicus curiae;

(c) on behalf of the Corporation in connection with any action or proceeding or controversy, at law or otherwise, to apply for and, if possible, to procure a libel, an attachment, a garnishment, an order of arrest or other preliminary, provisional or intermediate relief and to resort to and to utilize in all ways permitted by law any available procedure for the effectuation or satisfaction of the judgment, order or decree obtained;

(d) in connection with any action or proceeding, at law or otherwise, to perform any act which the Corporation might perform, including by way of illustration and not of restriction, acceptance of tender, offer of judgment, admission of any facts, submission of any controversy on an agreed statement of facts, consent to examination before trial, and generally to bind the Corporation in the conduct of any litigation or controversy as seem desirable to the Agent;

(e) to submit to arbitration, to settle, and to propose or to accept a compromise with respect to, any claim

existing in favor of or against the Corporation, or any litigation to which the Corporation is, or may become or be designated a party;

(f) to waive the issuance and service of a summons, citation or other process upon the Corporation, to accept service of process, to appear for the Corporation, to designate persons upon whom process directed to the Corporation may be served, to execute and to file or deliver stipulations on the Corporation's behalf, to verify pleadings, to appeal to appellate tribunals, to procure and to give surety and indemnity bonds at such times and to such extent as the Agent shall think to be desirable or necessary, to contract and pay for the preparation and printing of records and briefs, to receive and to execute and to file or deliver any consent, waiver, release, confession of judgment, satisfaction of judgment, notice, agreement, or other instrument which the Agent shall think to be desirable or necessary in connection with the prosecution, settlement or defense of any claim by or against the Corporation or of any litigation to which the Corporation is or may become or be designated a party; and

(g) to pay, from funds in his control or for the account of the Corporation, any judgment against the Corporation or any settlement which may be made in connection with any transaction enumerated in this section, and to receive and conserve any moneys or other things of value paid in settlement of or as proceeds of one or more of the transactions enumerated in this section, and to receive and endorse checks and to deposit the same.

7. Income from Corporation. To demand, to receive, to obtain by action, proceeding or otherwise any money or other thing of value in which the Corporation has or claims an interest to which any signatory hereto is or may become or may claim to be entitled as salary, wages, commission or other remuneration for services performed, or as a dividend or distribution upon any stock, or as interest or principal upon any indebtedness, or any periodic distribution of profits from any partnership or business and to indorse, collect or otherwise realize upon any instrument for the payment so received.

8. Records. (a) To keep records of all cash received and disbursed for or on account of the Corporation of all credits and debits to the account of the Corporation, and of all transactions affecting in any way the assets and liabilities of the Corporation;

(b) to prepare, to execute and to file all tax, social security, unemployment insurance and information returns, required by the laws of the United States, of any state or of any subdivision thereof or of any foreign government, to prepare, to execute and to file all other papers and instruments which the Agent shall think to be desirable or necessary for the safeguarding of the Corporation against excess or illegal taxation or against penalties imposed for claimed violation of any law or other governmental regulation; and

(c) to prepare, to execute and to file any record, report or statement, which the Agent shall think to be desirable

or necessary for the safeguarding or maintenance of the Corporation's interest, with respect to price, rent, wage or rationing control, or other governmental activity.

9. Insurance. (a) To continue, to pay the premium or assessment on, to increase, to amend, to modify, to rescind, to release, to procure, or to terminate any contract of life, accident, health, disability, fidelity, fire, transit, liability or other insurance or surety of whatsoever nature (including, but not by way of limitation, the so-called "broker's blanket bond") or any combination of such insurance procured by or on behalf of the Corporation which insures the Corporation or any other person, without regard to whether the Corporation is or is not a beneficiary thereunder; and

(b) to make claim under any contract of insurance mentioned in this section and to pursue, collect and/or settle any such claim or any claim heretofore made under any such contract on such basis as the Agent may deem appropriate.

10. Instruments. To execute, to acknowledge, to seal and to deliver on behalf of the Corporation or any customer of the Corporation any conveyance, revocation, declaration, modification of trust, deed, assignment, transfer, guarantee of signature, mortgage, lease, notice, consent, agreement, authorization, check, stock, bond or other security or option thereon or with respect thereto, or any other instrument or document which the Agent may think useful for the carrying out of the powers granted hereby or for the liquidation of the business of the Corporation.

11. Security Transfer. To assign or cause to be assigned on behalf of and in the name of the Corporation any securities registered in the name of Pickard & Company, Incorporated, and the undersigned acknowledges and agrees that the signature of Pickard & Company, Incorporated so affixed, as well as any signature of Pickard & Company, Incorporated affixed to any assignment of securities prior to the date hereof shall be the valid signature of Pickard & Company, Incorporated and none of the signatories hereto shall make any claim against any transfer agent or corporation whose securities are being transferred on the faith of such signature, or against any assignee of such securities, including any claim that any such signature was or will be improperly affixed or was or will be invalid or unauthorized.

12. Agents. To hire, to discharge, and to compensate any attorney, accountant, expert witness or other assistant or assistants when the Agent shall think such action to be desirable for the proper execution by him of any of the powers given him by this power of attorney and to charge against the assets of the Corporation the fees of the Agent and of any such attorneys, accountants, witnesses and other assistants.

13. General. To do any other act or acts which any one or more or all of the signatories hereto are able to do on behalf of the Corporation or which the Corporation is able to do and which the Agent shall think to be desirable or necessary for the liquidation of the business, including those acts

which are to be performed by the person appointed as Liquidator pursuant to the Agreement.

Each of the signatories hereto hereby agrees that he will execute and deliver such further instruments and documents as may be deemed by the Agent to be necessary or desirable in order to implement, carry out or render more effectual this power of attorney, including, without limitation, powers of attorney relating to the recovery of taxes under the Internal Revenue Code and of other taxes based on or measured by income, as a result of the right to carry any loss for tax purposes to a fiscal year other than that in which such loss occurs.

Each of the signatories hereto hereby ratifies and confirms all that his Agent, any of the Agent's agents, or the successor, or successors of the Agent, shall lawfully do or cause to be done by virtue hereof.

This power of attorney is a power coupled with an interest and is irrevocable.

This power of attorney may be signed in any number of counterparts, no one of which need contain the signatures of all of the signatories hereto, and as many of such counterparts as shall together contain the signatures of all such signatories shall constitute one and the same instrument.

IN WITNESS WHEREOF, the undersigned has executed or caused to be executed this power of attorney this 17 day of May, 1968.

PICKARD & COMPANY, INCORPORATED

ATTEST: _____ By _____

_____

_____

_____

_____

_____

_____

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

On this 17 day of May, 1968, before me, a notary public within and for said County, personally appeared [illegible], who, being by me duly sworn, did depose and say that he is the [illegible] of PICKARD & COMPANY, INCORPORATED, a corporation; that he knows the seal of said corporation; that the seal affixed to the foregoing instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation; and that he signed his name thereto by like order.

[illegible]
Notary Public

MORTIMER GERSER
Notary Public, State of New York
No. 41-1400160 Queens County
Term Expires March 30, 1969

Defendant's statement pursuant to Rule 9(g)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

AUBREY B. LANK, as Receiver of Pickard & Company, Incorporated, Plaintiff, -against- THE NEW YORK STOCK EXCHANGE, Defendant.	71 Civ. 5525 (MEL) STATEMENT PURSUANT TO RULE 9(g) OF NEW YORK STOCK EXCHANGE, INC.

Defendant New York Stock Exchange, Inc. (the "Exchange") respectfully submits that the following material facts are not in dispute.

1. The plaintiff, Aubrey B. Lank, is the receiver of Pickard & Company, Incorporated ("Pickard"), appointed by the Delaware Court of Chancery.

2. Pickard was a Delaware corporation engaged in the securities business and was a member organization of the defendant New York Stock Exchange, Inc. (the "Exchange"). In February 1968 Pickard commenced restricting its business which eventually resulted in its liquidation and the receivership proceeding.

3. Defendant Exchange is organized pursuant to the New York Not-for-Profit Corporation Law. Prior to its incorporation and at all times relevant to this action, the Exchange was an unincorporated association existing under the laws of the State of New York. It has been a registered national securities exchange under Section 6 of the Securities Exchange Act of 1934 since October 1934.

4. The Exchange has established a Special Trust Fund pursuant to Article XIX of its Constitution. The trustees of

the Special Trust Fund of the Exchange are not named as defendants in this action. They have authorized the Exchange to assert as a counterclaim in this action the indebtedness of Pickard to the Special Trust Fund.

5. This action was co. enced in December 1971. Until March 1975, the only activity in this action was the assertion of an answer and counterclaims by the Exchange, a reply thereto by the plaintiff, a request for production of documents by the plaintiff (in January 1972), and a response to that request by the Exchange (in April 1972).

6. The four causes of action asserted by the plaintiff are claims which, if they exist at all, belong to the creditors, subordinated lenders and shareholders of Pickard.

7. Pickard officers and employees were the subject of disciplinary proceedings and sanctions by the Exchange and by the Securities and Exchange Commission for wrongdoings prior to the liquidation of Pickard.

8. Pickard entered into two agreements, one dated February 13, 1968 and the other dated May 16, 1968, with the Exchange and the Special Trust Fund to assist it in its efforts to put its books and records in order and to meet its financial obligations.

9. Pursuant to those agreements, Pickard is indebted to the Exchange in the amount of $56,712.09 plus interest, and to the Special Trust Fund of the Exchange in the amount of $170,295.42 plus interest.

Dated: New York, N.Y.
March 31, 1975

Respectfully submitted,

MILBANK, TWEED, HADLEY & McCLOY

By _____
(A Member of the Firm)
One Chase Manhattan Plaza
New York, N.Y. 10005
Attorneys for Defendant
New York Stock Exchange, Inc.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- x

AUBREY B. LANK, as Receiver of Pickard & Company, Incorporated,

Plaintiff,

- against -

THE NEW YORK STOCK EXCHANGE,

Defendant.

- x

AFFIDAVIT

71 Civ. 5525 (MEL)

STATE OF DELAWARE)
) ss.:
COUNTY OF NEW CASTLE)

AUBREY B. LANK, being duly sworn, deposes and says:

1. I am the Receiver of Pickard & Company, Incorporated ("Pickard"), and I am submitting this affidavit in opposition to defendant's motion for an order dismissing the complaint and granting to it summary judgment on its counterclaims.

2. I was appointed Receiver by an order of the Court of Chancery of the State of Delaware in and for New Castle County on April 22, 1969. A copy of such order is attached hereto as Exhibit "A".

3. Pickard, a Delaware corporation, formerly had its principal place of business in New York City. It was a registered broker-dealer and investment advisor and was a member firm of the New York and American Stock Exchanges.

4. When Haskins & Sells, Pickard's independent public auditors, reported to the New York Stock Exchange that it was

unable to perform its annual audit as of September 30, 1967 because of deficiencies and inaccuracies in the books and records of Pickard, Pickard's demise entered its final stages. As appears in paragraph "5" below, the Exchange had long been aware that Pickard was a firm in serious trouble. When Haskins & Sells reported to the Exchange that it could not complete its audit, the Exchange finally -- but too late -- descended upon Pickard in force. The events which followed are reported in the affidavit of Lloyd McChesney which is attached as an exhibit to the Bishop affidavit contained in the moving papers. Mr. McChesney at that time was and for some time had been the Chief Examiner for the New York Stock Exchange.

5. It is an indisputable fact that the New York Stock Exchange became aware, as early as 1966, of capital violations and other serious derelections by Pickard which, consistent with its private club philosophy, were concealed from the public. Such facts are established in the affidavit of Robert S. Carlson (and the Exhibits annexed thereto) also submitted in opposition to this motion.

6. I did not become aware of the Stock Exchange's knowledge of Pickard's violations until well after my appointment as Receiver on April 22, 1969. As soon as I gained such knowledge, I petitioned and received permission from Chancellor Duffy to file a counterclaim in the Delaware receivership proceeding alleging violations by the Exchange of Section 6 of the Securities Act of 1934. Attached hereto as Exhibit "B" is a copy of Chancellor Duffy's order and as Exhibit "C" a copy of the counterclaim filed pursuant thereto. The Stock Exchange moved to dismiss such

counterclaim upon the ground that exclusive jurisdiction over such claim resided in the federal courts. Chancellor Duffy granted such motion in an opinion dated September 20, 1971. Attached as Exhibit "D" is a copy of such opinion. I then promptly filed this action in this Court.

7. After commencement of this action, its prosecution was delayed because of a prospective settlement. I was advised by J. Edward Meyer III that the defendant Stock Exchange was willing to settle the action by withdrawing its claim as general creditor in the receivership proceeding in Delaware and exchanging releases and a stipulation of discontinuance of this action. Mr. Meyer stated that the attorneys for the Stock Exchange however would not implement the settlement until the Exchange was insulated from the claim of subordinated lenders (aggregating some one million dollars) by the passage of time. Accordingly, I instructed Mr. Meyer, since the settlement seemed to me to be fair, not to prosecute the action but to await implementation of such settlement.

8. Contrary to the unsupported assertion contained at page 12 of the Exchange's brief, there are approximately 30 general creditors in addition to the Exchange whose claims, which aggregate well in excess of $100,000, have not been paid.

9. The Stock Exchange's motion for summary judgment on its counterclaims is palpably untenable. The first two counterclaims are for expenses incurred and advances made on behalf of Pickard. As noted in the McChesney affidavit, the Stock Exchange, itself, instituted the receivership proceeding in

Delaware and filed a claim as a general creditor in that proceeding for the sums claimed in its first two counterclaims. On August 30, 1971, I disallowed such claim. I disallowed such claim because I felt it prudent in the circumstances. Not only had the Exchange and the Special Trust Fund taken in excess of $350,000 out of the assets of Pickard [which are not the subjects of its counterclaims] the propriety of which concerned me, but also I was concerned about the validity of the agreement upon which the Exchange relies to compensate itself so handsomely. The testimony of one of Pickard's shareholders suggests that such agreement may have been the product of duress. Attached hereto as Exhibit "E", for example, are pages 55 through 57 of the deposition of Gerrit Lansing in an action brought by him against the Exchange. Accordingly, I decided to put the Exchange to its proof in the receivership proceeding.

10. The question of the validity of the Stock Exchange's claim will come on for a hearing before the Chancellor in accordance with the provisions of Title 8 of the Delaware Code, along with other claims which I have disallowed. Chaos would result if persons whose claims have been disallowed could then commence litigation in other forums. The statutory scheme obviously contemplates an orderly resolution of the validity of claims in the receivership proceeding itself. And here, it would be an anomaly indeed if the Exchange, having itself instituted the receivership proceeding, filed its claim and had it disallowed, could then, disappointed with the result, try its luck in another forum.

11. The Exchange's third counterclaim (for alleged waste in instituting this action) is similarly ill-founded. First, the institution of this action was authorized by the Court

of Chancery. A copy of such order is attached hereto as Exhibit "F". Second, the defendant once before sought to enjoin this proceeding by a motion before Chancellor Duffy. Chancellor Duffy denied the motion, with an opinion, a copy of which is attached hereto as Exhibit "G".

AUBREY B. LANK

Sworn to before me
April 21, 1975.

Exhibit A to Plaintiff's Affidavit—Order Appointing Plaintiff as Receiver of Pickard

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY AMERICAN ARBITRATION ASSOCIATION

CASE No.

NEW YORK STOCK EXCHANGE, an unincorporated association under the laws of the State of New York, Plaintiff, v. PICKARD & COMPANY, INCORPORATED, a corporation of the State of Delaware, Defendant.	APR 25 1974 No. C-1 EXHIBIT Civil Action No. 2997

ORDER

The application of the plaintiff for the appointment of a receiver for the defendant Pickard & Company, Incorporated, a corporation of the State of Delaware, came on for hearing on April 14, 1969 after notice to the stockholders and subordinated lenders of defendant pursuant to the order of this Court dated March 21, 1969.

Prior to said hearing the affidavit of Howard S. Kass, attorney for Mrs. Agnes Mackey, Executrix of the Estate of John Mackey, a subordinated lender of defendant, was filed in opposition to the application for the appointment of a receiver and a letter from John Sackville Pickard, a stockholder of the defendant, was also filed in opposition to the application for the appointment of a receiver.

At said hearing there were present in the court room John P. Sinclair and Floyd E. Brandow (New York Bar), attorneys

for plaintiff; Richard J. Abrams and Alvin K. Hellerstein (New York Bar), attorneys for the defendant; Robert Bishop, a Vice President of plaintiff; Lloyd W. McChesney, Liquidator of the defendant; John Sackville Pickard; and Thomas H. Magness, Jr., a subordinated lender of the defendant.

The Court heard testimony by Mr. McChesney and oral presentations by all persons in the court room who expressed a desire to be heard.

The Court finds that the defendant is insolvent in that it cannot pay its debts as they mature and in that its liabilities exceed its assets; and the Court hereby determines that a receiver should be appointed for the defendant; and therefore

IT IS ORDERED that Albert Lunn, Esq. of Wilmington, Delaware, be and he is hereby appointed domicillary receiver of Pickard & Company, Incorporated, a corporation of the State of Delaware, pursuant to Title 8 Del. C. § 291, which section reads as follows:

"§ 291. Receivers for insolvent corporations; appointment and powers.

Whenever a corporation shall be insolvent, the Court of Chancery on the application of any creditor or stockholder thereof, may, at any time, appoint one or more persons to be receivers of and for the corporation, to take charge of its assets, estate, effects, business and affairs, and to collect the outstanding debts, claims, and property due and belonging to the corporation, with power to prosecute and defend, in the name of the corporation or otherwise, all claims or suits, to appoint an agent or agents under them, and to do all other acts which might be done by the corporation and which may be necessary or proper. The powers of the receivers shall be such and shall continue so long as the court shall deem necessary."

to take charge of the estate and effects, business and offices of said corporation, and to collect the outstanding debts,

claims, and property due and belonging to the said corporation, with power to prosecute and defend, in the name of the corporation, or otherwise, all claims or suits, to appoint an agent or agents under him, and to select attorneys to represent him, and to do all other acts which might be done by the corporation, if in being, that may be necessary and proper; and

IT IS FURTHER ORDERED that Lloyd W. McChesney, liquidator of defendant, is hereby authorized and directed to turn over to said domicillary receiver, the estate and effects, business and offices, of said corporation; and the said Lloyd W. McChesney shall, upon compliance with this authorization and direction, be released from all further duties and responsibilities as liquidator of Pickard & Company, Incorporated; and

IT IS FURTHER ORDERED that the said domicillary receiver herein appointed shall execute and file in the office of the Register of this Court a bond in the usual form with surety to be approved by the Chancellor in the penal sum of $ 20,000.00 conditioned on the faithful performance of his duties as domicillary receiver in this proceeding, and for the proper accounting to the Court for any moneys or property that may come into his hands as such domicillary receiver; and

IT IS FURTHER ORDERED that

~~_____, a corporation of the State of _____, be and the same is hereby approved as surety upon the bond of the domicillary receiver herein appointed; that~~ the plaintiff in this cause shall, within 16 days from date hereof, enter

and file in the Office of the Register of this Court a cost bond in the usual form in the sum of $ 500.00, ~~and~~ with corporate surety, ~~a corporation of the State of~~ ~~is hereby approved as surety thereon~~

Chancellor

Form C-17

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE,)
)ss
NEW CASTLE COUNTY.)

I, BASIL R. BATTAGLIA, Register of the Court of Chancery of the State of Delaware, in and for New Castle County, do hereby certify that the foregoing is a true and correct copy of an Order signed by Chancellor Wm Duffy on April 22, A. D. 1969 in Civil Action 2997, New York Stock Exchange vs Pickard & Company, Incorporated as the same is on file and remains of record in this Court.

I FURTHER CERTIFY that an Order was signed by Chancellor Wm Duffy on April 25, A. D. 1969 striking therefrom the requirements for the posting of a cost bond in the Amount of $500.00

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the Seal of said Court at Wilmington, this 21st day of May, A. D. 1969.

Exhibit B to Plaintiff's Affidavit—Order Granting Receiver's Motion to file Counterclaim

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

NEW YORK STOCK EXCHANGE, an unincorporated association under the laws of the State of New York,	:	
Plaintiff,	:	
v.	:	Civil Action No. 2997
PICKARD & COMPANY, INCORPORATED, a corporation of the State of Delaware,	:	
Defendant.	:	

ORDER

AND NOW, TO WIT, this 7 day of April, 1971, the Court having heard counsel for both parties,

IT IS ORDERED as follows:

The Motion of Aubrey B. Lank, Esquire, Receiver of Pickard and Company, Incorporated, to file and serve a Counterclaim against the plaintiff, is hereby granted.

Chancellor

Approved as to Form:

/s/ William H. Uffelman

William H. Uffelman
Theisen, Lank & Kelleher
1118 Wilmington Trust Bldg.
Wilmington, Delaware
Attorney for Aubrey B. Lank
Receiver

/s/ John P. Sinclair

John P. Sinclair
Potter, Anderson & Corroon
Delaware Trust Bldg.
Wilmington, Delaware
Attorney for Plaintiff

Exhibit C to Plaintiff's Affidavit—Receiver's Counterclaim

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

NEW YORK STOCK EXCHANGE, an unincorporated association under the laws of the State of New York,	:	
Plaintiff,	:	
v.	:	Civil Action No. 2997
PICKARD & COMPANY, INCORPORATED, a corporation of the State of Delaware,	:	
Defendant.	:	

1. Respondent, Aubrey B. Lank, by order of this Court dated April 22, 1969, was appointed Receiver of Pickard & Company, Incorporated ("Pickard"), a corporation of the State of Delaware, formerly a registered broker-dealer, investment advisor and a member firm of the New York Stock Exchange ("Exchange").

2. Plaintiff is a national securities exchange registered with the Securities and Exchange Commission under Section 6 of the Securities Exchange Act of 1934. Section 6(b) of the 1934 Act provides:

> "No registration shall be granted or remain in force unless the rules of the exchange include provision for the expulsion, suspension, or disciplining of a member for conduct or proceeding inconsistent with just and equitable principles of trade, and declare that the willful violation of any provisions of this title or any rule or regulation thereunder shall be considered conduct or proceeding inconsistent with just and equitable principles of trade."

3. As a registered national securities exchange, the Exchange was and is obliged as a matter of law to comply and to enforce compliance by its members with the provisions of the Securities Exchange Act of 1934, all

amendments thereto and rules and regulations promulgated thereunder, and its own rules and regulations. The Exchange was and is obligated to have adequate and timely controls to detect and monitor both the operational and financial problems of its members.

4. In pursuance of such obligations, the Exchange adopted various rules, including Rule 325, known as "net capital rule", the purpose of which is to ensure that all member firms have enough liquid capital to meet the financial needs of their businesses. Rule 325 requires that a member firm's aggregate indebtedness does not exceed twenty times its net capital (as such terms are defined in Rule 325). Rule 325 requires that the Exchange (subject to exceptions not here applicable) shall cause a member firm in violation to cease doing business. Moreover, the Exchange itself puts member firms on a restricted list and subjects them to greater surveillance as their net capital ratio approaches 20 to 1. The purpose of the Rule was and is to insure that such firms, if in trouble, could be suspended or liquidated at a time when they still had enough liquid capital assets to cover the claims of their customers, creditors and members of the public.

5. In derogation of its obligations to its members, the Securities and Exchange Commission and the investing public, the Exchange, however, at all times acted like a "private club" and adopted a policy of not enforcing its own rules designed to protect the investing public, and in particular the Exchange adopted a policy of not enforcing Rule 325 preferring rather to attempt to have its members work out their problems although in violation of Rule 325 notwithstanding the Exchange's obligations under Section 6 of the 1934 Act to enforce its own rules for the protection of the public.

6. The Exchange knew or should have known as early as October, 1966 that Pickard was in violation of the Exchange's net capital rule and that its operational problems were critical. Moreover, on information and belief, the Securities and Exchange Commission notified the Exchange in 1967 of Pickard's inability to furnish the Securities and Exchange Commission with certain records. In pursuance of its private club approach, the Exchange continued to do nothing, notwithstanding its knowledge of Pickard's long-standing violation of the "net capital" and other rules of the Exchange and as a result of such failure by the Exchange to fulfill its obligations and suspend Pickard from membership in the Exchange when it should have done so in 1966, damage was subsequently suffered by Pickard, the investing public, and Pickard's creditors and shareholders.

7. Subsequent to the time when the Exchange should have suspended Pickard's membership, Pickard continued to carry on its business as a member firm of the New York Stock Exchange,buying and selling securities for its own account and for its customers, inducing the advance of subordinated loans, selling shares of its capital stock and incurring debts in the ordinary course of its business.

8. Moreover, because of the failure of the Exchange to fulfill its obligations, the course of Pickard's business continued to deteriorate and there occurred defalcations by registered representatives of Pickard and by its principal officers, John Pickard and Peter Pickard, neither of which would have occurred had the Exchange fulfilled the obligations imposed upon it by law.

9. Finally, on February 9, 1968, the Exchange ordered Pickard to restrict its business so as not to accept any orders from customers which would require them

to deliver cash or securities to Pickard. On February 13, 1968, the voting stockholders, but not the non-voting stockholders or subordinated lenders of Pickard, entered into an agreement with the Exchange by which the Exchange assigned a number of its employees to work on Pickard's books and records in order to prepare a meaningful statement of Pickard's financial condition. As of this date, Pickard's only activity was its own liquidation, and the Exchange's belated assumption of the business and financial affairs could not rectify the damage caused by the Exchange's earlier failure to enforce its own rules.

10. Charges were filed with the Board of Governors of the Exchange, and after a hearing on August 7, 1968, the Board of Governors found that John Pickard and Peter Pickard, respectively President and Vice President of Pickard had withdrawn in excess of $650,000 of Pickard's funds without the knowledge of the other officers and directors. The Messrs. Pickard were expelled as allied members of the Exchange and lesser sanctions were imposed on another officer.

11. The Securities and Exchange Commission on August 5, 1968 initiated proceedings against the Messrs. Pickard and other Pickard employees. As a result of such proceedings, the broker-dealer and investment advisor registrations of Pickard were revoked, bar orders were issued against the Messrs. Pickard and disciplinary action was taken against other employees of Pickard.

12. Heretofore and on or about the 24th day of July, 1970, the Exchange filed a claim against the Receiver of Pickard in the sum of $227,007.51. It is the claim of the Exchange that Pickard is indebted to the Special Trust Fund of the Exchange (a trust established pursuant to Article XIX of the Constitution of the Exchange) in the

amount of $170,295.42 and to the Exchange itself in the amount of $56,712.09. The Special Trust Fund, it is claimed, stands in the right of Pickard's banks and creditors since the fund discharged Pickard's obligations to them. The debt to the Exchange it is claimed arises as a necessary expense of liquidation. In this connection, the Exchange's total claim against Pickard for salaries through February 28, 1969 was $326,360.09 of which $269,648.00 was recovered by the Exchange out of the proceeds of the sale of Pickard's membership in the New York Stock Exchange.

13. The Exchange owed a duty to customers of Pickard, to its stockholders, to all persons, firms, or entities doing business with Pickard and to the subordinated lenders of Pickard to enforce compliance by Pickard with the Securities Exchange Act of 1934, the rules and regulations promulgated thereunder and its own rules and regulations including the provisions of its net capital rule. Had the Exchange fulfilled such duty, all defalcations occurring subsequent to October, 1966, all losses to customers, subordinated lenders, shareholders and all creditors of Pickard who advanced money to Pickard subsequent to October, 1966, would have been prevented.

14. The Exchange's failure to suspend or revoke Pickard's membership in the Exchange constituted a continuing representation to the public that Pickard was a responsible member firm of the Exchange which conducted its business in accordance with just and equitable principles of trade. The Exchange's knowledge that Pickard had violated the Exchange Act of 1934, rules and regulations promulgated thereunder, as well as the Exchange's own rules and regulations not only constituted a scheme and artifice by the Exchange to defraud, but also made the Exchange an aider and abettor of Pickard's violation of the Securities Exchange Act of 1934 and rules and regulations promulated

thereunder.

15. The Receiver did not learn of the aforesaid violations by the Exchange of the Securities Exchange Act of 1934 and its own rules and regulations until after the commencement of his receivership.

16. By reason of the foregoing, the Receiver demands judgment against the Exchange for (a) the sum of $269,648.00 paid to the Exchange out of the proceeds of the sale of Pickard's membership in the New York Stock Exchange, plus interest; (b) $99,650.00 paid by Pickard on February 19, 1969 to the Special Trust Fund, plus interest; (c) $1,032,220.00 representing all sums advanced by subordinated lenders subsequent to October, 1966, plus interest; (d) $205,126.27 representing all sums due general creditors of Pickard, plus interest; (e) $466,071.67 representing sums paid by purchasers of shares of stock of Pickard subsequent to October, 1966; (f) costs plus Receiver's and attorney fees.

WHEREFORE, respondent demands judgment against claimant for the sum of $2,072,715.94 together with costs and Receiver's and attorney fees.

/s/ William H. Uffelman

William H. Uffelman
Theisen, Lank & Kelleher
1118 Wilmington Trust Bldg.
Wilmington, Delaware
Attorney for Aubrey B. Lank,
Receiver of Pickard & Company,
Incorporated

Of Counsel:

Roth, Carlson, Kwit, Spengler, Mallin & Goodell
280 Park Avenue
New York, New York

Exhibit D to Plaintiff's Affidavit—Decision Dismissing Receiver's Counterclaim

COURT OF CHANCERY
OF THE
STATE OF DELAWARE

WM. DUFFY
CHANCELLOR

COURT HOUSE
WILMINGTON, DELAWARE

September 20, 1971

Michael Goldman, Esquire
350 Delaware Trust Building
Wilmington, Delaware 19801

Aubrey B. Lank, Esquire
Wilmington Trust Building
Wilmington, Delaware 19801

John P. Sinclair, Esquire
350 Delaware Trust Building
Wilmington, Delaware 19801

William H. Uffelman, Jr., Esquire
Wilmington Trust Building
Wilmington, Delaware 19801

Re: New York Stock Exchange v. Pickard & Company, Inc.
Civil Action No. 2997

Gentlemen:

I conclude that the motion of the New York Stock Exchange (plaintiff) to dismiss the Receiver's counterclaim, argued September 8, must be granted for the following reasons:

(1) A fair reading of the counterclaim shows that it is based on Section 6 of the Securities Exchange Act of 1934 and Stock Exchange Rules promulgated thereunder. I refer particularly to paragraphs 2, 3, 4 and 13; the gravamen of the claim is the

allegation that plaintiff failed "to enforce compliance by Pickard with the Securities Exchange Act of 1934." Exclusive jurisdiction of any claim under that Act is vested in the Federal courts, 15 U.S.C.A. § 78aa, and the Delaware courts will not usurp that jurisdiction or any portion thereof. American Hardware Corp. v. Savage Arms Corp., Del. Supr., 136 A.2d 690 (1957); Standard Power & Light Corp. v. Investment Associates, Del. Supr., 51 A.2d 572 (1947); Williams v. Sterling Oil of Oklahoma, Inc., Del. Ch., 267 A.2d 630 (1970), reversed on other grounds, 273 A.2d 264.

(2) To the extent that there is a common law duty on plaintiff to supervise its members, a Delaware court may have jurisdiction to hear and determine alleged violations of such a duty because, by definition, the Act did not create it. See this Court's opinion in Investment Associates, 48 A.2d 501, and compare Columbian Fuel Corporation v. Superior Court, Del. Supr., 158 A.2d 478 (1960). But the Receiver has not shown any authority to support his hypothesis that there is a common law duty. The only opinions I have seen are to the contrary. Raldris v. Simmons,

TO: Michael Goldman, Esq. PAGE: 3 DATE: 9/20/7
Aubrey B. Lank, Esq.
John P. Sinclair, Esq.
William H. Uffelman, Jr., Esq.

242 App. Div. 603, 271 N.Y.S. 1018, aff'd 195 N.E. 208 (1934); Morgenbesser v. New York Stock Exchange, N. Y. Supr. Ct., 2/10/71. And compare Pettit v. American Stock Exchange, 217 F.Supp. 21 (S. D. N.Y., 1963), and Baird v. Franklin, 141 F.2d 238 (2 Cir., 1944), in which the duty is discussed entirely in terms of § 6.

At oral argument the Court discussed with counsel the question of whether the substance of the counterclaim may be used as an affirmative defense. (This is referred to on page 9 of Mr. Uffelman's brief.) It is my understanding that counsel disagree as to whether or not that can be done. On the present state of the matter (pleadings and briefs) I do not regard this question as one submitted for decision. If the Receiver desires to rely on the allegation of the counterclaim as an affirmative defense, then he should file an appropriate pleading and its contents may then be tested for defense purposes on application of either party.

In view of the conclusion I have reached it is unnecessary to consider other arguments made by counsel.

Yours truly,

WD/L

Original: Register in Chancery

stock transfer records. All of this in the normal urse of trying to straighten out complaints.

Q In other words, this was in carrying out your duties as an employee?

A That is right.

Q Now, at any time, and now I am passing beyond the period of your employment, did you receive financial statements with respect to the standing of the firm?

A Yes. May 5th.

MR. DELANEY: This is one that was received. I think you can--this was received from Mr. Bishop.

MR. JACKSON: Mr. Delaney has produced a paper headed "As of the close of business May 3, 1968" consisting of two sheets. I ask that it be marked as the next exhibit.

(Document consisting of two pages, marked Defendant's Exhibit 18 for identification, this date.)

Now, this statement which has been marked Defendant's Exhibit 18, from whom did you receive it, Mr. Lansing?

A I received this statement from Mr. Bishop, and during the course of receiving it, he explained to me that there is very little to hope for, in receiving any monies back from the firm as a subordinated lender.

Q When did you receive this from Mr. Bishop?

A I believe it was the first part of June.

Q 1968?

A 1968.

Q And was this at a meeting that took place between Mr. Bishop and yourself?

A That is correct. Mr. Bishop called me and requested that I meet with him in his office. He presented me with this, and then also presented me with the liquidator's agreement that he wanted me to sign. Mr. Ott was also present, but he was requested to do the same thing.

Q Who is Mr. Ott?

A Mr. Ott was the research man for Pickard & Co. He was there when I arrived. I didn't come with him.

Q Did you sign the liquidation agreement at that time?

A No, I did not.

Q Did you sign it at any later time?

A No, I did not.

Q What discussion did you have with Mr. Bishop on that subject?

A As I say, he gave me, or he--at the time he didn't give this to me. It was later sent. But he showed me the original of this statement from Haskins & Sells, I

believe it is, and he said according to this, there is very little hope of my recouping very much from my subordinated account, and that in order to expedite the matters further, so that Pickard wouldn't be thrown into bankruptcy, he was appointing a liquidator and that I was required to sign the liquidation agreement which he handed to me at that time.

Q What did you say to him?

A I said that I would have my lawyer look it over and that I would discuss it further with him.

Q And did you have your lawyer look it over?

A I did.

Q Mr. Delaney?

A Mr. Delaney.

Q Did you then have a further discussion with Mr. Bishop?

A Yes, we did.

Q Was that also at his office?

A I think, I don't believe it was really related to the liquidator's agreement. We did, later on, have discussions with Mr. Bishop in his office and also when he took us to lunch.

Q What occurred in those further discussions that you had with Mr. Bishop?

A They were mostly concerned with the return of the Nadel & Lansing stock to myself.

Q Which you have already testified about?

A Which I have already testified about.

Q Anything else discussed?

A Not that I recall, unless Mr. Delaney could.

Q Was Mr. Delaney--

MR. DELANEY: Off the record.

(Discussion off the record.)

Q Was Mr. Delaney present at the first discussion with Mr. Bishop when Mr. Ott was also present?

A No, he was not.

Q Was anyone else present besides Mr. Bishop, Mr. Ott and yourself?

A No.

Q Now, at subsequent discussions with Mr. Bishop was Mr. Delaney present?

A Yes.

Q And at how many such discussions were both of you and Mr. Delaney present with Mr. Bishop?

A One.

Q And when and where did that occur?

A That occurred at the New York Stock Exchange, in Mr. Bishop's office and also at lunch with Mr. Bishop, the

Exhibit F to Plaintiff's Affidavit—Order Granting Receiver Authority to Sue in United States District Court for the Southern District of New York

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

NEW YORK STOCK EXCHANGE, an unincorporated association under the laws of the State of New York,	:	
Plaintiff,	:	
v.	:	Civil Action No. 2997
PICKARD & COMPANY, INCORPORATED, a corporation of the State of Delaware,	:	
Defendant.	:	

ORDER

AND NOW, TO WIT, this 13th day of April, 1972, the Court having considered the Motion of the plaintiff for a decree ordering the Receiver to stipulate to a stay of the proceedings in Lank v. New York Stock Exchange, 71 Civ. 5525, in the United States District Court for the Southern District of New York, and having further considered the petition on behalf of the Receiver to file said suit,

IT IS ORDERED as follows:

1. The plaintiff's Motion for a decree ordering the Receiver to stipulate to a stay of the proceedings in Lank v. New York Stock Exchange, 71 Civ. 5525, in the United States District Court for the Southern District of New York is hereby denied.

2. That the Receiver is hereby explicitly granted the authority to file an action heretofore brought in the United States District Court for the Southern District of New York known as Lank v. New York Stock Exchange, 71 Civ. 5525.

3. That the Receiver is hereby authorized to retain the firm of Roth, Carlson, Kwit, Spengler & Goodell

280 Park Avenue, New York, New York, as attorneys for the Receiver, whose fee for such services shall not exceed the sum of $2,500.00, without further order of this Court.

/s/ [illegible]
Chancellor

APPROVED AS TO FORM:

/s/ William J. Uffelman
William J. Uffelman
1118 Wilmington Trust Building
Wilmington, Delaware
Attorney for Aubrey B. Lank,
Receiver for Pickard & Company,
Incorporated

/s/ Michael Goldman
Michael Goldman
350 Delaware Trust Building
Wilmington, Delaware
Attorney for Plaintiff

Exhibit G to Plaintiff's Affidavit—Decision Denying New York Stock Exchange's Motion to Compel Receiver to Terminate Action

COURT OF CHANCERY
OF THE
STATE OF DELAWARE

WM. DUFFY
CHANCELLOR

COURT HOUSE
WILMINGTON, DELAWARE

October 19, 1972

Michael D. Goldman, Esquire
350 Delaware Trust Building
Wilmington, Delaware 19801

William H. Uffelman, Jr., Esquire
Wilmington Trust Building
Wilmington, Delaware 19801

LITIGATION DEPT.
FILED
SIGNED
SERVED
RECEIVED 11/6/72
ORDERED
ENTERED
DIARY
REGISTER
EXAMINED

Re: New York Stock Exchange v.
Pickard & Company, Incorporated
Civil Action No. 2997

Gentlemen:

This is the decision on the motion of plaintiff, New York Stock Exchange, to compel the Receiver of Pickard & Company to terminate his action against the Exchange in the United States District Court for the Southern District of New York.

The basis of the motion is that the action is a waste of Receivership assets. The Exchange argues that so much of the action as seeks recovery for losses incurred by creditors, subordinated lenders and stockholders of Pickard is wasteful because these are not claims of Pickard and the Receiver has no authority to assert them. The Exchange concedes that its motion does not seek termination of that part of the New York action which asks

for a judgment of some $270,000 based on pre-receivership transfers to it, its employees and to the Special Trust Fund. In other words, so far as the present motion is concerned, the New York action will go on in any event. The issues which the Receiver may attempt to litigate there constitute the only issue here.

Citing Bovay v. H. M. Byllesby & Co., Del. Ch., 22 A.2d 138 (1941) and Keedy v. Sterling Electric Appliance Co., Del. Ch., 115 A. 359 (1921), the Receiver argues that when an insolvent corporation has perpetrated a fraud on its creditors by an illegal and improper disposition of its assets, its receiver may enforce the rights of creditors and, in so doing, has even greater rights than the corporation would have had. And so he has under Bovay and other cases based upon fraudulent transfers and under various circumstances when the corporation could not recover. See, for example, Clark on Receivers, § 599,795.1 and 802; and 45 Am.Jur., Receivers § 435; compare Buttrey v. Merrill, Lynch, Pierce, Fenner & Smith, Inc., 410 F.2d 135 (7 Cir. 1969).

The recent decision of the United States Supreme Court in Caplin v. Marine Midland Grace Trust Co., ___ U.S. ___, 32 L.Ed.2d 195 (1972), holds that a trustee in bankruptcy has no standing to sue an indenture trustee which failed to police a 2:1-asset-liability

ratio called for by the indenture; the Court held that the trustee could not sue on the basis of rights which belonged to debenture holders. The Exchange relies, strongly, on this case and without doubt its facts are quite comparable to those in the Receiver's action. But, arguably, Caplin is based on an interpretation of Chapter X of the Bankruptcy Act and the role of a trustee in reorganization under that Act. Thus, while the Court discussed three different problems which barred the action, it might be said that the fundamental issue before the Court was entirely one of statutory construction; the majority of the Court said, for example, that the "issue is a difficult one, and . . . it is one that is capable of resolution by explicit congressional action", that is, by enlarging the limitations which the Court found in the Act.

D This Court should not test the Exchange's motion by the same standards the New York Court might apply in deciding a motion to dismiss. D The test is, rather, one of weighing or balancing an opportunity to litigate specific claims against the cost thereof. E Quite clearly, this Court should not authorize a receiver to pursue claims entirely devoid of merit E or those which he has no standing to assert. But I cannot say as a matter of law that Caplin and/or the other cases cited by the Exchange show that the claims by the Rec

(as stated in his complaint) fit into either category. The Receiver's claim is not against the persons to whom transfers of Pickard assets were made but against one whose conduct, he alleges, made such transfers possible; arguably, it might be said that the established law as to fraudulent transfers should be applied to that claim because there is little difference in principle, that is, in each case the defendant's conduct caused the loss to the insolvent corporation. In the context of that argument a defense based upon pari-delicto should be no more effective in one case than it is in the other. And, of course, it might be said that Caplin controls the result.

All matters as to the merits are for the New York Court. I am called upon only to weigh the use of corporate funds to make such argument in the context of a contention that this amounts to a waste of Receivership assets. Under present circumstances, it is not, in my judgment. Given (a) the potential benefit to the Estate, (b) the arguments which are available to the Receiver, (c) the relatively few decisional guidelines in a newly developing area of the law, (c) the fact that the New York action will continue in any event, and (d) since all expenditures are under the control of this Court, I conclude that the Receiver should have an opportunity to persuade

TO: Michael D. Goldman, Esq. PAGE: 5 DATE: 10/19/72
William H. Uffelman, Jr., Esq.

the New York Court that he has both a cognizable status and a basis for recovery on all the claims he has asserted. The motion of the Exchange will be denied.

Finally, while I make no special point of this, I do note the somewhat unique position of the Exchange which is both the defendant in the New York action and the movant here. Many a litigant believes that a suit against him is worthless but rarely does one have the opportunity to litigate that precise point independent of the merits.

Yours truly,

WD/L

Original: Register in Chancery

Affidavit of J. Edward Meyer, III

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

AUBREY B. LANK, as Receiver of Pickard & Company, Incorporated, Plaintiff, -against- THE NEW YORK STOCK EXCHANGE, Defendant.	:	71 Civ. 5525 (MEL) AFFIDAVIT

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

J. EDWARD MEYER, III, being duly sworn, deposes and says:

1. I am a member of the firm of Spengler Carlson Gubar & Churchill, counsel for the plaintiff, and I am submitting this affidavit in opposition to the defendant's motion to dismiss. It is the particular purpose of my affidavit to explain plaintiff's delay in the prosecution of this case.

2. Prior to and after the commencement of this Action in December, 1971, I had several conversations with representatives of defendant's attorneys about a settlement of the claims set forth in the complaint. After consultation with Aubrey Lank, the Receiver, I advised such representatives that the action could be settled by an exchange of releases if defendant withdrew its claims as a general creditor in the receivership proceeding against Pickard & Company, Incorporated, as described in the McChesney affidavit annexed to the moving papers.

3. Defendant, however, was concerned that it would not necessarily be protected from subsequent suits brought by subordinated lenders, and I specifically recall John Jerome, Esq., who then appeared to be in charge of the defense, suggesting that the litigation between the parties be held in abeyance until the claims of the subordinated lenders against Pickard had been resolved, or until the statute of limitations had run. I thought these proposed settlement terms fair and reasonable as did the Receiver and, as a consequence, this action lay dormant.

4. There remains pending and in progress before the American Arbitration Association one arbitration between Pickard and four subordinated lenders wherein the issue to be resolved is whether Pickard or the subordinated lenders have title to several subordinated accounts. Once that proceeding was terminated, I had intended to request counsel for defendant to consummate the settlement discussed with its attorneys and close the receivership proceedings in Delaware.

5. Had I not believed that the action was to be settled as outlined above, plaintiff would of course have prosecuted this action vigorously. Since defendant seems to have had a change of heart, plaintiff now intends to.

J. EDWARD MEYER, III

Sworn to before me this
16th day of April, 1975.

Notary Public

Notary Public, State of New York
No. 41-3813923
Qualified in Queens County
Commission Expires March 30, 1977

Affidavit of Robert S. Carlson

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- x

AUBREY B. LANK, as Receiver of Pickard & Company, Incorporated,

Plaintiff,

- against -

THE NEW YORK STOCK EXCHANGE,

Defendant.

- x

AFFIDAVIT

71 Civ. 5525 (MEL)

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

ROBERT S. CARLSON, being duly sworn, deposes and says:

1. I am a member of the firm of Spengler Carlson Gubar & Churchill, attorneys for plaintiff in this action, and I am submitting this affidavit in opposition to defendant's motions to dismiss and for summary judgment.

2. I have been handling an arbitration proceeding before the American Arbitration Association captioned: "Pickard & Co., Incorporated and C. Fink Fischer, et al., Case No. 1310-0165-69". That proceeding concerns subordinated loan agreements between Pickard and Stratton R. Ours and Adelaide Ours, Jean B. Fischer and C. Fink Fischer, wherein the Fischers and Ours subordinated their accounts with Pickard to the claims of general creditors arising prior to March 1, 1968. Under the terms of such agreements, Aubrey Lank, as Pickard's Receiver, is entitled to these subordinated accounts if Pickard was, on March 1, 1968, insolvent, engaged in a liquidation or in the marshalling of its

assets and liabilities. As counsel for the claimant, I, on March 25, 1975, summoned as a witness Lloyd McChesney, former Chief Examiner of defendant, The New York Stock Exchange, who testified that in his opinion, Pickard was insolvent on the relevant date and was also engaged in a liquidation.

3. On cross-examination, counsel for respondent, who is defending upon the ground that the subordination agreements were induced by fraud, cross-examined Mr. McChesney upon that issue. A copy of the transcript of McChesney's testimony with respect to that issue is attached hereto as Exhibit "A". Such testimony must be read in light of another exhibit, introduced during the course of such proceeding, which sets forth charges brought by defendant Exchange against Pickard and its officers and directors on July 25, 1968 which resulted in the expulsion of Pickard's principals from allied membership in the Exchange. Such proceedings are discussed in paragraph 11 of the McChesney affidavit [Exh. "A" to Bishop Affidavit]. A copy of such charges against Messrs. Sackville-Pickard, et al is attached hereto as Exhibit "B".

4. Of particular relevance in Exhibit "B" is the revelation by the Exchange that it was aware of violations of the net capital and other rules by Pickard as early as late 1965 or early 1966 and was aware thereafter of a continually worsening situation resulting in the imposition of sanctions and the curtailment of Pickard's business. The Court is referred to that section of Exhibit "B" entitled "Previous Disciplinary Action" appearing at pages 4 to 7.

5. Mr. McChesney testified not only that many of the events and occurrences set forth in the defendant Stock Exchange's charges against Pickard were not only material to any investment decision with respect to Pickard but also that such events and occurrences would have a negative impact upon any investment decision. Moreover, Mr. McChesney testified that it was the policy of defendant Stock Exchange to conceal such adverse facts from the public (Exh. A, p. 229).

6. It is the position of plaintiff Lank that, had defendant fulfilled its obligations under §6 of the 1934 Act, the fraud perpetrated upon Pickard which is established in the McChesney affidavit (Exh. "A" to Bishop Aff.) and in the defendant's charges against Pickard (Exhibit "B") would not have occurred.

7. Thus, at Paragraph 11(a) of the McChesney affidavit it is stated: "John Sackville Pickard and Peter Sackville Pickard, respectfully President and Vice-President of Pickard, were found to have withdrawn, directly or indirectly, in excess of $650,000 of Pickard's funds without the knowledge of other officers and directors of Pickard."

8. And, at pages 8 to 13 of Exhibit "B", the defendant, itself, describes such occurrences as, "Fraud or fraudulent acts.." At page 13 of Exhibit "B", it is stated:

> As a result, aside from Anglo-American loans, John and Peter Pickard arranged for and accomplished a series of steps involving interest payments, loan repayment, advances, stock redemption and compensation, all without authorization resulting in aggregate withdrawals from the firm of approximately $344,000, all without the knowledge of the other officers and directors. While some transfers were accomplished over a period of many months, an unusual number of steps occurred in January and February 1968 immediately prior to the Exchange's stepping into the picture, and at a time when Pickard & Co. was experiencing severe operations problems.

9. It would be difficult to conceive of a more egregious case where the Exchange's callous and supercilious policy of "the public be damned" directly led to the kind of fraud perpetrated here.

Robert S. Carlson
ROBERT S. CARLSON

Sworn to before me
April 21, 1975.

GREGORY KATZ
Notary Public, State of New York
No. 31-4522950
Certificate Filed in New York County
Commission Expires March 30, 1976

Exhibit A to Carlson Affidavit—Testimony of McChesney

form. It appears to be a form in which names were inserted so that it is possible. I am not certain.

MR. BURNS: I would like this document, which are the minutes of the Board of Governors of the New York Stock Exchange for August 7, 1968 marked as Exhibit K.

(Whereupon the above-mentioned document was marked Respondents' Exhibit K in evidence, as of this date.)

Q Referring you to Exhibit K, it indicates that on page 2, that you testified before the New York Stock Exchange Board of Governors on August 7, 1968 in respect to the Pickard matter. Can you tell us what was the subject matter of your testimony?

MR. CARLSON: Where on page 2?

MR. BURNS: It is in the minutes.

Q What was the subject matter of your testimony?

A The subject matter had to be, among other things, the condition of the books and records and the financial condition of Pickard & Company.

Q What did you say about the financial condition of Pickard & Company?

A I certainly can't recall any details of my

testimony at this time.

Q What is the best of your recollection?

A I am certain that I testified that the books and records were in atrocious condition and that the --

Q Still August 7, 1963?

A As of the time the Exchange personnel went into assistance with the firm in late January or early February, and that the books and records have been an extremely important issue prior to that, and based upon the fact that Haskins & Sells firm was unable to complete their audit and render an opinion.

Q Did you testify about the various charges that are referred in Claimant's Exhibit No. 14?

A To the extent I was questioned about individual charges, I responded to the inquiry.

Q Did you participate at all in the preparation of Claimant's Exhibit No. 14?

A I was undoubtedly responsible for supplying some of the information to those who prepared these charges.

Q Did you participate in the preparation of these charges?

A I would have to read it through to find out.

Q Let me take you through some of it.

Page 4 under the title of previous disciplinary action. There is reference to violations of the Exchange capital requirements from June 30, 1965 to July 15, 1965. Did you at that time have any familiarity with that subject?

A No.

Q Did that have anything to do with the chief examiner's office?

A Yes.

Q Does that come under the responsibility of the chief examiner?

A It would. It would definitely come under the responsibility of Mr. Bishop who was the vice president of the member firm and the finance department, and the chief examiner's department would have participated somewhat in it.

Q Do you know it says that Pickard & Company was censured for having permitted the violation? Do you know about that?

A I was not chief examiner during that period of time.

Q Did there ever come to your attention that Pickard had been censured for permitting the violation of June 30, 1965 to July 15, 1965?

A I am certain that during the course of 1968 and 1969 I became aware of it.

Q Did you become aware that Pickard & Company had been warned that another violation might lead to more drastic disciplinary action?

A I am certain I heard of it in 1968 or 1969.

Q Was that an important subject matter to the chief examiner's office?

A Disciplinary action, generally was handled directly under Mr. Bishop.

Q Tell me what the function of the chief examiner's office was?

A The principal function of the chief examiner's office was to mail financial questionnaires to firms in connection with their surprise audit after we received the announcement of the public accountant, and for most New York Stock Exchange member firms, the examiners also sent out two financial questionnaires during the course, one on each third of the year. All these answers were returned to the Exchange. They were analyzed by the examiner's staff to determine whether that firm, based on the figures supplied, were in conformity with the capital requirement. We maintain a staff about fifty-five examiners who

examined the firm's in the field and their responsibility was, among others, was to check back the answers supplied to the books and reports of the firm, to verify that the books and records accurately reflect what has been reported to the Exchange. A factual report on their finances were subsequently forwarded to the principal of the finance division where the next level of communication with the member firm was handled.

Q Is this part of the supervision function of the New York Stock Exchange?

A Yes.

Q Did the examiner's office have any responsibility to verify any figures or any of the information which it analyzed?

A Yes, as I indicated, the examining staff usually just once a year, would examine the answers and compare them back to the books.

Q Once a firm had been censured for not meeting the Exchange capital requirement, did the examiner's office take any additional interest in the firm to see if it was complying with the capital requirement?

A We followed it. We continued to follow the

routine of looking at their reports three times a year, and occasionally, a firm would be required to report on a monthly basis to the Exchange so we could follow the progress of the firm.

Q Do you know during the period of June to July of 1965, were many of the member firms in violation of the capital requirements?

A I have no knowledge of that.

Q Do you know that?

A The best person to obtain information of that kind would be Robert Fischman (spelled phonetically).

Q When a member firm is censured and warned about the capital requirement, is that any sort of a red flag to the examiner's office to pay more attention to the firm than to the other firms?

A I would say that it would be a little bit more emphasis in careful examining every report from that firm as opposed to where there was no incident.

Q When did you become a chief examiner?

A Early 1967.

Q At the time you took office, was that the policy of the chief examiner's office to Pickard & Company?

A I cannot know that Pickard & Company was actually

BEST COPY AVAILABLE

called to my attention. It was called to my attention.

Q Was it communicated to you that Pickard had been censured and warned?

A I have no recollection of this at this particular time.

Q Do you know whether there has been any disclosure to the public that Pickard & Company had been censured and warned?

A I think it was rare at that time that any kind of activity was published.

Q Was it just kept in the house with the Board of Governors?

A It would have been. The Board of Governors, the Exchange staff, who were interested interested in that particular area and the firm itself, of course.

Q Do you know whether any disclosure of that censure and warning was made to Mr. Ours?

A I have no knowledge of that.

Q If you were an accountant advising someone whether or not to invest in a member firm, would you consider that information relevant to whether or not the investment should be made?

A Yes, I think I could.

Q Going further on page 4, there is a reference here that the causes of an unsatisfactory capital condition in June of 1966 and the question of adequacy of records, Pickard & Company agreed on June 30 to restrict its operations until further notice. That is back in 1966.

Did that information eventually come to your attention?

A Undoubtedly, I learned in 1968 or 1969 -- I don't recall any earlier references to it.

Q When you took office as chief examiner, did any of the information eventually come to your attention?

A Undoubtedly I learned over in 1968 or 1969, I don't recall any earlier references to it.

Q When you took office as chief examiner, did any of the information come to your attention?

A Not that I remember.

Q Let us turn to page 5, and could you tell us what it was that Pickard was restricted from doing? We are dealing now with a disclosure that in June of 1966 Pickard was restricted because of its net capital. You have got it. What was it that

Pickard didn't do?

A There are six items here:

Could not trade for the Pickard Company account except for riskless transactions to bill customer's over-the-counter orders.

Q Can you tell us what that means in laymen terms?

A A riskless trade is when a firm buys for its own account or sells for its own account a security and simultaneously is a customer order on the other side of the trade so they are not taking an inventory position.

Q That was something they could not do?

A They could not get into any riskless trade. They could not take an inventory position for themselves.

The second item is the hiring of additional representatives.

Q They can't do that?

A That is correct.

The third item is open any new branch offices.

Q They could not do that?

A That is correct.

Number 4. Accept any new margin accounts with

significant debt balance.

Q What does that significant debt balance mean?

A That is a relative term. Debt means the customer owes money to the broker-dealer.

Q What does "significant" mean in that context?

A I could substitute the word large for significant.

Q What would it mean to you in percentage terms?

A I would have to look at it in context with the total position of the firm. I can't -- I don't think I could realistically put a figure.

Q As chief examiner, would this be the kind of thing you would have to look for when you were looking at the financial records of Pickard to see if they violated that restriction?

A Yes, the staff would do this.

Q How would the staff determine whether the margin account had a significant debit balance?

A They would undoubtedly review the new accounts that have been owned by the firm and probably if any of the largest ones, if they opened new accounts,

would be significant, depending upon the other, depending on the total size and the other accounts that the firm has handled.

Q The margin accounts did become significant in your investigation?

A They had margin accounts, and we had the problem of resolving those margin accounts and getting rid of them, getting them out to the customers and other brokers and dealers.

Q You never had any payments paid into them?

A They were probably so. I really can't divulge specifics.

Q We'll get into specifics a little later. Assuming that I am correct in that statement, wouldn't this restriction have some bearing upon that problem with the margin account?

A This is just talking about the new margin.

Q Some of them were new that you had problems with later on with this restriction. Would that restriction have a bearing on that one?

A Yes. It violated the agreement they made with the Exchange.

Q Back on item 4. The new margin account,

would that significantly interfere with the Pickard expansion or development of any new business?

A It would prohibit them from opening a new account with a large debit balance.

Q That could significantly curtail their business expansion; could it not?

A That would curtail their expansion.

Q The same as their prohibition of hiring any additional representatives?

A Yes.

Q Getting to the item 5. --

A Item 5 says engage in underwritings other than those which Pickard & Company was presently irrevocably committed.

Q What does that mean?

A They could not engage in underwriting or new issues of stock.

Q That also could curtail their opportunity to expand their business?

A Yes.

Q In fact it could curtail their past business; could it not?

A I don't know.

Q They couldn't continue in the underwriting

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business once they were out of those which they were presently committed?

A Correct.

Q That would require them to discontinue their underwriting operation within a reasonable time, would it not?

A Yes, except the sentence leading into this said they agreed to this on June 30, appending clarification of its capital condition.

Q Let us look at item 6. What does that mean?

A Effect any new transactions for Pickard & Company's opening conversion account and agreed to close out existing positions as represented to papers expired. The capital conversion account operation is where the broker-dealer enforces openings and typically takes an offsetting long or short position in the underlying securities and, so, they are now prohibited from affecting any new transactions endorsing any new openings.

THE CHAIRMAN: May I ask one question? This agreement that Pickard entered into, is this a public record at the Exchange offices which could be reviewed by any member of the

public?

THE WITNESS: No, sir.

THE ARBITRATOR: This would be between the Exchange and Pickard?

THE WITNESS: Yes.

THE ARBITRATOR: Would it not have been knowledge as to what the restrictions on Pickard were?

THE WITNESS: That is correct.

THE ARBITRATOR: Those dealing in an open-end relation with Pickard would not have been aware of some of these restrictions and, if Pickard violated them, the parties on the other side could possibly be in violation of the Exchange rule without having knowledge of it? Let us assume I opened an account and the, took my account with a large debit balance, I would not be aware that I was in violation of the Exchange's agreement with Pickard Company; would that be true?

THE WITNESS: You would not be in violation.

THE ARBITRATOR: But Pickard & Company would be in violation. I would not be aware

of this, and I opened my account because -- the point I am getting at is even though the Exchange may come into this, and protect me, if they could not deliver the equity in my account, I would not have known that when I opened the account, but the Exchange would have known there was a violation against these people when they agreed not to do this?

THE WITNESS: That is correct.

CONTINUED EXAMINATION

BY MR. BURNS:

Q How would the Exchange know there was a violation?

A By examining the record.

Q That was your function eventually?

A That is the function of the examiner's office.

Q When you came into office in 1967, nobody brought this to your attention about Pichard?

A This particular restriction according to this, was June of 1966, based on one of the exhibits, I talked here earlier about today. The firm was back in capital compliance.

Q Let us read on in this because I don't think that is what it says. Finishing with those

six items, we come to the next sentence which says:

"Shortly thereafter, the restriction was amended to permit a trading limit of not more than $100,000 covering transactions which were not of a riskless nature."

So that means item 1 they are allowed to do that kind of thing up to $100,000?

A Right.

Q Accordingly, to the way I read it, the restrictions 2 through 6 remain in effect unamended?

A Insofar as this document reflects it, that is correct.

Q Then it says there was a subsequent visit by an Exchange examiner, and what did that disclose?

A First item is a violation of rule 325 on June 30, 1966 when the capital requirements were short --

Q The next item is what?

MR. CARLSON: Do you want us to read them?

MR. BURNS: Interpret them.

A To maintain that a net capital of at least $25,000 in excess of minimum requirements or an amount which would provide a ratio of aggregate indebtedness to net capital of not more than 1500

per cent, whichever was the greater dollar cushion.

Q What does that mean?

A Rule 325 requires that the ratio of aggregate indebtedness should not excess 2000 per cent. It is a policy matter. The Exchange did not want the ratio to go above 1500 per cent.

Q Is that in respect to all member firms?

A Yes, and the Exchange wanted a minimum excess of $25,000.

Q There was a special agreement between Pickard and the Exchange?

A There was according to this, there was an agreement probably -- I suspect Pickard was notified by letter of this minimum requirement.

Q What are the other three items listed here that were discovered?

A The next item is a violation of rule 402 in failing to segregate customer's securities properly and promptly.

Q What does that mean?

A The rule requires that customers fully pay for securities and excess margin securities and have to be segregated, that is they cannot use, they cannot hypothecate them to borrow money and Pickard

was in violation of this rule. The next item is the violation of the SEC rule 240.8(c)1. In coming to the customer security and bank loans without the written consent of each customer.

Q What does that mean?

A Apparently, Pickard failed to get written consent of each customer. A standard procedure in the brokerage industry for each customer who signs an account, signs an agreement. They did not have the signed agreement.

Q What does that agreement authorize them to do?

A It authorizes them to operate -- the general authorization is the firm is allowed to pledge securities per customers to borrow on money from banks or that amount on the stock loan basis as long as they are not fully paid for.

Q Then 5.

A Violation of rule 405(3), in failing to approve in writing the opening of new accounts. That rule requires that whenever a registered representative opens a new customer account for a customer; a partner, an authorized officer will look over the agreement and approve it in writing.

Q Turning to page 6 of Claimant's Exhibit No. 14, it appears that after you became the chief examiner that representatives of Pickard appeared before the Exchange on February 7, 1967, and that they were censured for those violations and fined $5,000 for them. Do you recall anything about that?

A I think that it still preceded the time when I became chief examiner. It seems to me that it was the latter part of February or perhaps early March when I became chief examiner. I don't have any recollection.

Q It goes on to say that the special restrictions were continued until further notice.

MR. CARLSON: That is what it says.

Q Did you know anything about that?

A I have no recollection.

Q Do you know if any of those restrictions were ever brought to your attention when you became chief examiner?

A I don't recall at this time.

Q Do you recall if the chief examiner's office made any efforts to determine during 1967 whether the special restrictions were being complied with?

A I have to refer back to the Exchange files to see what examinations were made and reports issued.

Q Would it be possible to do that?

A I don't know to what extent the Exchange records may be available to me at this time. I am no longer employed there.

Q Do you know what the name or file would be that would contain that information?

A File, Pickard & Company.

Q It would be under the chief examiner's office?

A Not at this late date. It would be in the central files.

Q Do you know whether the existence of these restrictions were disclosed to the public?

A In all likelihood, they were not.

Q Do you know whether the events of the information on that visit were disclosed to the public?

A They would not be.

Q Do you know whether the censure and the $5,000 fine were disclosed to the public?

A I don't know.

Q Do you know whether it would have been

the practice to disclose that at that time?

A I don't know if that was a practice or not.

Q Do you know who would know that?

A The NASD.

Q This would have been reported to the NASD?

A Was the censure and fine, as I read it. I may be reading.

Q You are reading something else.

A I was reading further down.

Q I am talking about the advisory committee action.

A That would not be -- in all likelihood that was not published.

Q Do you know whether or not the subordinated lenders of Pickard & Company were advised of any of this information, either the restrictions over the findings or the censure and the fine?

A I don't have any knowledge of that.

Q You have no knowledge whatsoever of whether they would have been or would not have been?

A That is correct.

Q Do you know whether there was any disclosure either to Fischer or Ours of that information?

A I would not have knowledge of that.

Q You don't know of any such disclosure?

A No.

Q You don't know of any disclosure to the subordinated lenders to Pickard?

A No.

Q It says further on that the censure closed with the statement which was a warning that further failure to comply with the rules might lead to suspension or expulsion. Were you aware of that at any time during 1967?

A I have no recollection.

Q Did it ever come to your attention?

A I have no recollection of that.

Q When you became liquidator of the Pickard did it come to your attention?

A I am certain in 1968 or '69 it came to my attention.

Q At the end of that paragraph there is a statement that all of the present allied members of the corporation received a copy of such censure, except John A. Schwartz, Jr., who was not associated with the corporation at that time. Does that refresh your recollection on whether it was the policy of the

Exchange to advise th subordinated lenders of this type of information at that time?

A That is a matter which was outside the purview of the chief examiner's office.

Q If you were an accountant conducting an audit and preparing a report on the financial statements for our company, would you include in the footnote any reference to the restrictions that I have referred to earlier, if they came to your attention?

A I am trying to recall any incident in which a detail of any restrictions appeared in any audited financial statement of broker-dealer. Offhand, I cannot think of any.

Q If the SEC were to enter a restriction which was a public report, wouldn't you include that?

A I think that would depend upon the severity and timing.

Q But if it were severe enough and effected the company's general operations wouldn't you feel that in accordance with general accounting practices and principles, that you would have to make some reference to it?

A I think there is a strong possibility that anything that would have a material adverse effect

upon the operations of the firm would be disclosed.

Q If they can't accept certain margin accounts, such as in item 4, on page 5, couldn't that have sufficient material effect on the company's operations?

A I don't believe that by itself would.

Q Let us add to item 6 that they would have to close out their opening business.

A That would depend whether or not their opening business was a significant generator of revenue.

Q But it could possibly be something that would materially be required to be disclosed?

A Possibly.

Q What about the requirement that they curtail their underwriting business?

A Same answer.

Q Could be material?

A Could be.

Q The fact that they can't hire any additional registered representatives, would you consider that possibly material?

A It might be.

Q In fact, if they were losing registered representatives and couldn't hire, you would almost

have to say they are going out of business?

A I believe this restriction was intended to keep them from hiring additional personnel and not restrictions on replacing personnel.

Q I see, and would the restriction that they could not open any new branch offices, could that be material?

A It would certainly keep them from expanding.

Q As an accountant, if you didn't disclose that, you would be incurring a risk for non-disclosure?

MR. CARLSON: I object to the form of the question.

CONTINUED EXAMINATION

BY MR. BURNS:

THE WITNESS: Let me comment to the answers on the financial questionnaires that are prepared by companies which would reflect the financial condition in the prescribed format as of the given moment in time, and the accountant of an auditor of stock brokerage firms at that period of time rarely reported on the income statement of broker and dealer, and so all of these restrictions certainly would tend to influence the income

statement, but they would have not had that much impact upon a balance sheet of a given point in time, and I think I undoubtedly have some influence on whether or not the auditors felt the necessity to report on these in the answers to the financial questionnaire.

Q If you were an investor or potential investor of a member firm, would you want to consider this kind of information in determining whether or not to make the investment?

MR. CARLSON: I object to that.

Q If you were an accountant advising an investor, would you consider this restriction in how to advise the investor?

A Yes.

Q It could make a difference whether you would recommend an investment; couldn't it? Certainly would influence a decision and would be a negative influence, would it not?

A Absolutely.

(The examination recessed at 12:00 noon to 12:10 P.M.)

CONTINUED EXAMINATION

BY MR. BURNS:

Q Mr. McChesney, referring to those five items which were discovered in the subsequent visit by the Exchange examiner listed on page 5 of Claimant's No. 14, do you have any information as to whether any of these subordinated lenders were notified of those discrepancies?

A I have no knowledge of that.

Q Do you know whether any of the Fischers or Ours were notified of that?

THE ARBITRATOR: Do we have a date on that visit?

THE WITNESS: Probably between June, 1967 and February 1967.

CONTINUED EXAMINATION

BY MR. BURNS:

Q Would that information be something which an accountant should refer to in a footnote in a financial statement?

A I doubt that this information would have been put into a footnote to a financial statement with the possible exception to item 1.

Q Do accountants, when they find the problems with the internal control, make a reference

to it in the footnote?

A They would probably make a reference to this in the accountant report, since there is a requirement under the SEC Rules and Exchange Rules that accountant's report must state they have examined the system of accounting control and the procedures for safeguarding the customer's securities.

Q Item number 3, would that go into an accountant's report?

A It depends upon whether or not it is material.

Q What would make it material or not material?

A I just don't think I could give you any precise numbers. It is a matter of relevance to the other circumstances of the firm, and so forth.

Q But a substantial, say more than ten per cent of the securities, would that be material?

A I don't think I am in a position to answer that.

Q Item 4 could also relate to internal control, would it not?

A Yes.

Q That also could go into the accounts reported?

A To the accountant. I doubt if the accountant would report on that.

Q What about limitations on net capital, such as the one in item 2. Was that the one that was in existence for all member firms?

A No.

Q That was a special one for Pickard; is that correct?

A That is correct.

Q Would an accountant refer to that in his footnote to a financial statement?

A That may be referred to in a footnote.

Q Should it be?

A The violation?

Q The agreement?

A The agreement that they are required to keep.

Q Right.

A I don't recall offhand any instances in which I have seen that kind of an item disclosed in a footnote.

Q You haven't seen that kind of an item in respect to any other member firms; have you?

A It is not an uncommon kind of an arrangement for a firm that has experienced some difficulty to

be required by the Exchange to maintain capital above the minimum required by rule 325.

Q So this indicates that the firm had experienced some difficulty with the knowledge of the Exchange; is that correct?

A Yes.

Q But it doesn't indicate what that difficulty was?

A Well, the difficulty had to be a problem in meeting and complying with rule 325.

Q Which is capital requirement?

A Right.

Q And if you were an accountant advising an investor, would you consider that a significant factor to consider?

A I certainly think the investor should be apprised of that fact.

Q Do you know anything about the determination by the NASD to censure Pickard, which was referred to on the bottom of page 6?

A Your question is do I know anything about it?

Q That is correct?

A I have no recollection of it other than reading it here.

Q As chief examiner of the Exchange, would it have come to your attention that on March 30, 1967, the NASD censured Pickard and fined them $3,000?

A Probably.

Q Do you recall whether you took any action in response to obtaining that information?

A No, no recollection of it.

Q Do you recall whether it was your policy when you obtained information like that, to exercise more than ordinary care in investigating and scrutinizing a member firm's affairs?

A That would come to the attention of the examiner's department, but we would have taken cognizance of it, and the next time an examiner was sent to visit the firm, he would be aware of this, perhaps look into some of these same areas.

Q Do you recall whether that actually happened?

A I have no recollection.

Q Would you have increased the number of visits that people from your department made to the subject member firm?

A This, combined with any other information we

had, such as history of this firm, would have generated extra scrutiny of the firm.

Q What would that extra scrutiny entail?

A Possibly at that time, I don't know for certain, in this case, possibly, we would have more frequent reports from the firm concerning its capital position, principally.

Q Just concerning yourself with the capital position.

A Principally, this is the principal concern of the Exchange, and the examiner's department.

Q Did the examiner's department care about employees who were properly registered?

A Oh, yes.

Q That would have scrutinized that, since it became -- since the NASD declared it was something that Pickard was guilty of?

A In addition to the examiner's department, there was another area in the Exchange. I don't recall the name of it at this particular time, but there was this area, the department of supervisory standards, it comes to mind that also looked into areas of this nature. Whether or not there were representatives, and whether or not they were

registered and also would examine some of the other practices away from the capital itself.

Q Would your department have taken any interest in that?

A I think I stated previously that assuming this would come to our attention, and I am reasonably sure it did, and that the examiner on the next visit would look into these particular areas very carefully, such as the violation of the regulations.

Q I am sticking right now with the failure to register certain employees, and we will go through each one.

A I believe they would have looked at that.

Q What would have been done?

A Probably he would have examined the first, the accounting records to the extent that they were available and reliable, and to see which one of the persons who were actually receiving commissions for the sales of securities.

Q If they were not reliable, what would they have done?

A They would examine whatever was available.

Q Were they required to have reliable records?

A Yes, of course. It is obvious they were not meeting all the requirements.

Q If they did not have registered those employees, wouldn't it be grounds to put them out of business at that time?

A I think the sequence of events would be when they find violations, as has happened here, at the staff level, the restrictions were placed on them with respect to its operation and if the violations either become more severe, then, by action of the Board of Governors, a censure is either directed by the Board of Governors or the committee of the board.

Q But if they did not have records as to who was being paid commissions would that be grounds for censure, too?

A That is a decision made further up the line.

Q You just report it?

A Yes.

Q Did you report it or not?

A I have no recollection at this time.

Q It is possible, but we can assume, perhaps, you were the examiner, and you did find such records and checked out the registration of the employees?

A That is possible.

Q Either thing is possible.

A Yes.

Q Let us go to item 2. I don't know what that means. Can you tell me what that means?

A Yes. If the firm had a mark-up on the transaction -- for example, if you bought something for $100 and sold it for stock up to $105, that is not extensive. If it gets up to $110 and $115, when you got a 10 or 15 per cent mark-up, that is excessive. The general rule which is followed, which is anything over 5 per cent, is excessive.

Q Did the Exchange care about that one way or another?

A Oh, yes.

Q Would that be something your department would investigate?

A Yes.

Q For Pickard?

A Yes.

Q Do you know whether any further investigation was made of that particular subject matter of Pickard?

A I don't recall.

Q Who would know?

A I believe that could only be determined at this point in time by looking at the records, and the reports that the examiners made as a result of the visit.

Q What records could we call for?

A The examiner's records.

Q Was it the practice of the examiners to make a written report each time they visited Pickard?

A On a usual examination, they filed a written report.

Q Were they usual examinations?

A It may be that they for some reason, they visited a firm a few hours or less, for a specific purpose, and it may be that the report was issued orally. Generally when an examiner spends time with a firm, a written report was issued.

Q Would there be any records of a visit, a written record of a visit in which there would be an oral report?

A A written record.

Q Like a diary or something that says "I went there" or some kind of an assignment sheet where it says that a representative went on a particular

the violation and now would he increase the number of samples that he would take in his investigation of Pickard?

A Probably.

Q Would there be any circumstances under which he would not do that?

A He would if he has a long list of items he is supposed to look at at an examination. It depends upon the time available and the condition of the records and what factors go into this and each examiner is given a reasonably wide latitude and is allowed to exercise his judgment.

Q If the condition of the records was poor, would he devote more time to this problem or would he devote less time to this problem?

A I just don't think I could give you a categorical answer to that.

Q What should he do?

A He would report on all of the factual findings as a result of his examination.

Q You stated that the extent of his investigation in respect to the regulation, the requirement would depend on the condition of the records. Would you describe that?

Q Would that be something your examiner would be interested in?

A Yes.

Q That would be something that he would go in and investigate once he had this information?

A Not only when he had this information, but it was usual an examination of a member firm that the examiner would look for items of that nature.

Q Would he make such an investigation?

A They would review customer's accounts.

Q How would they do that?

A On a random basis. They would look at a purchase, typically the purchase is recorded on the settlement date which -- that was five days after the transaction date, and if the payment was not received from the customer within seven business days of the trade date, that would be a violation and request an extension. That would be a violation of the regulation.

Q He would report that to the Exchange if he discovered that?

A He would review it and see if there is a pattern of failure to monitor the accounts.

Q The NASD censured and fined Pickard for

case?

A Each examiner keeps his own diary and certainly the principal examiner who was usually the assistant chief would at all times know where they are. Whether there was a written record of that, I don't know at this time.

Q Let us go to item 3, the regulation, the violation. What does that refer to?

A There is a Federal Board Reserve regulation which requires that generally that a person pursuing a security must pay for that purchase within seven business days. If for any reason he is unable to complete that, the broker-dealer is required to either get an extension of time for that customer to pay for it by applying to the Exchange or NASD or the SEC, or the broker-dealer is required to liquidate the transaction. That is in essence what the regulation is.

Q Could you tell us what that item 3 indicates?

A Yes. The Pickard & Company failed to take action to liquidate 15 per cent of its securities in special account where the full payments have not been received by the broker-dealer.

A I don't know if I stated that precisely that way, --

THE CHAIRMAN: Is this hypothetical because you asked him what he should do or are we asking does he have knowledge?

MR. BURNS: I am pretty sure from what he said he didn't specifically remember any of this information.

THE CHAIRMAN: He is just guessing on what might have or might not have been done?

MR. BURNS: I am assuming he established the standards for the department, and what the examiners were supposed to do. Later we will try to find out what they actually did.

THE CHAIRMAN: As long as it is hypothetical --

CONTINUED EXAMINATION

BY MR. BURNS:

(The pending question is: In what way would the condition of the records affect the examination conducted by your examiner in respect to the regulation?)

A That is hard to answer precisely. The examiner,

as I said, has a considerable amount of latitude in his examination, and if he found the records were inaccurate, depending upon what he found in it, he would extend his examination in a given area. It is hard for me to say precisely that it would necessarily focus on the regulation.

Q Do you have an audit program for the examiners?

A Yes.

Q Do you know where a copy of that audit program would be?

A In the Exchange files.

Q Did you modify the audit program in respect to the particular examinations?

A The examiner was at liberty to modify that on the job as the conditions warranted it.

Q Would his supervisor modify it?

A He may very well come back and discuss it with the supervisor or principal examiner during the course of his visit.

Q Let me put it the other way around. Suppose you received the information that you received about the NASD censure and fine, would you then have modified, or would somebody in your department have

modified the audit program for Pickard?

A I think what would have happened, would be the principal examiner, in talking with the examiner assigned to this particular engagement, would advise him of this, and tell him to concentrate on these areas and see if these particular types of violations would continue.

Q That was the practice?

A That would be an oral communication to the examiner.

Q It wouldn't reflect in the audit program?

A No.

Q Would the audit program indicate how broad a sample would be taken in any particular area?

A I don't recall the details of the audit program at this time.

Q With reference to item 4, what are the freeze provisions of item 2 a person --

A As I recall it, before the broker could exercise another purchase order for that particular customer, he would have to first have the cash in hand so he could not violate the regulations again, and I think it is a 30 to 90 day freeze on that.

Q Assume that item 5 and 6 mean what they

look like, they say, turning to all of these items, do you know whether there is any disclosure to the public of this censure or this fine by the NASD?

A I don't know of my own knowledge.

Q Do you know what the practice of the NASD was at that time?

A I have seen published notices of fines by the NASD, and censures, and I don't recall right now whether it was true at that time.

Q Do you know whether the information about this censure and fine were disclosed to the Fischer, Ours?

MR. CARLSON: Apart from any NASD disclosure?

MR. BURNS: If he knows.

THE WITNESS: I have no knowledge.

Q Was any of the information contained at the bottom of page 6, and going through to page 7, the kind of information an accountant should disclose either in a note or report in the course of reporting on a financial statement?

A Very probably. Very probably item 5 would have been disclosed in that it indicates a lack of internal control.

Q Are any o these items, items that you, as an accountant advising a potential investor in Pickard, would desire to consider in determining whether or not to make such an investment?

A If I had knowledge of this, I would certainly advise the potential investor.

Q What kind of influence would this have?

A Negative.

MR. BURNS: You indicated we were going to break between 12:30 and a quarter of one, and I happen to be at a breaking point.

(Discussion off the record.)

(The hearing closed this day at 12:40 P.M.)

Exhibit B to Carlson Affidavit—Charges Against Pickard's Officers and Directors

NEW YORK STOCK EXCHANGE

Department of Member Firms

July 25, 1968

To: Board of Governors

From: Department of Member Firms

Subject: Charges Against John Sackville-Pickard, Peter Sackville-Pickard, Joseph V. Shields, Jr., Albert E. Posener, and Hayes A. Noel, Jr., Allied Members, and John A. Schwarz, Jr., Member

Fraud or Fraudulent Acts

Conduct Inconsistent with Just and Equitable Principles of Trade

Misstatement to the Board of Governors

Violation of Rule 325 - Capital Requirements

Violations of Regulation T

Violations of Rule 432 - Failure to Maintain Margin Records

Violations of Rule 402 - Failure to Segregate Customers' Free or Excess Margin Securities

Violations of Rule 440 - Maintenance of Records

Violation of Rule 401 - Good Business Practice

Note: Text of Above Rules Attached

Gentlemen:

There are presented herewith Charges against John Sackville-Pickard, Peter Sackville-Pickard, Joseph V. Shields, Jr., Albert E. Posener, and Hayes A. Noel, Jr., Allied Members, and John A. Schwarz, Jr., Member, all Voting Stockholders of Pickard & Company, Incorporated, under Sections 1, 5, 6, 7, and 16 of Article XIV of the Constitution which read in pertinent part as follows:

Section 1 - Article XIV - "A member or allied member who shall be adjudged guilty, by the affirmative vote of a majority of the Governors then in office, of fraud or of fraudulent acts shall be expelled."

Section 5 - Article XIV - "A member or allied member who shall be adjudged guilty, by the affirmative vote of a majority of the Governors then in office, of making a misstatement upon a material point to the Board of Governors.... may be suspended or expelled as the Board may determine."

Section 6 - Article XIV - "A member or allied member who shall be adjudged guilty, by the affirmative vote of a majority of the Governors then in office, of a violation of the Constitution of the Exchange or of a violation of a rule adopted pursuant to the Constitution .....or of conduct or proceeding inconsistent with just and equitable principles of trade may be suspended or expelled as the Board may determine."

Section 7 - Article XIV - "A member or allied member who shall be adjudged guilty, by the affirmative vote of a majority of the Governors then in office, of a wilful violation of any provisions of the Securities Exchange Act of 1934 or any rule or regulation thereunder shall be deemed to be guilty of conduct or proceeding inconsistent with just and equitable principles of trade and may be suspended or expelled as the Board of Governors may determine."

Section 16 - Article XIV - "A member or allied member of the Exchange who is a general partner in a member firm or a stockholder in, or an officer or director of a member corporation is liable to the same discipline and penalties for any act or omission of such firm or corporation as for his own personal act or omission. The Board of Governors, by the affirmative vote of a majority of the Governors then in office may relieve him from the penalty therefor or may remit or reduce such penalty on such terms and conditions as the Board shall deem fair and equitable."

STATEMENT OF FACTS

PART I

Background

Pickard & Company, Incorporated - Its Officers and Their Responsibilities

Pickard & Company, Incorporated (Pickard & Co.) was admitted as a member corporation of the Exchange on December 20, 1963. Officers and Directors at that time who have continued in the same capacity to date are as follows:

John Sackville-Pickard (John Pickard) is the President and a Director, who since early 1967, has been completely responsible for management and supervision of the member corporation's affairs including all back office operations. He has also been responsible for the member corporation's conformance with Exchange minimum capital requirements.

Peter Sackville-Pickard (Peter Pickard), the brother of John, is Vice President, Secretary, Treasurer, and Director. He has been primarily responsible for supervision of the member corporation's five branch offices and has also assisted in general administration.

Joseph V. Shields, Jr., has the title of Executive Vice President and is a Director. Since early 1967, he has devoted himself primarily to personal production of business.

Other officers and directors who held these positions during the period covered by the Charges which will follow are:

Albert E. Posener was a Vice President and Director at the time the member corporation was admitted to Exchange membership. He repre-

sented the member corporation on the Floor of the American Stock Exchange until he resigned on March 13, 1968, but he continues to hold voting stock of Pickard & Co. He had no other duties.

Warren C. Crunden, was a Vice President and Director and represented Pickard & Co. on the Floor of the New York Stock Exchange from February 18, 1965, until the latter part of June, 1967, when he resigned.

John A. Schwarz, Jr. is a Vice President and Director and has represented Pickard & Co. on the Floor of the New York Stock Exchange since June 22, 1967.

Hayes A. Noel, Jr., is an Assistant Vice President and Director and represented Pickard & Co. on the Floor of the American Stock Exchange until June 27, 1968, when his membership was sold.

Previous Disciplinary Action

On January 11, 1966, John Pickard and Pickard & Co.'s Exchange member at that time, Warren C. Crunden, appeared before the Advisory Committee in connection with violations of the Exchange's capital requirements from June 30, 1965, to July 15, 1965, at which time they and Pickard & Co. were censured for having permitted the violation and warned that another violation might lead to more drastic disciplinary action.

As the result of an unsatisfactory capital condition in June, 1966, and a question of the adequacy of records, Pickard & Co. agreed on June 30, 1966, pending clarification of its capital condition, to restrict its operations until further notice. Pickard & Co. agreed not to:

1. Trade for the Pickard & Co. account except for "riskless" transactions to fill customer over-the-counter orders,

2. Hire any additional registered representatives,

3. Open any new branch offices,

4. Accept any new margin accounts with significant debit balances,

5. Engage in underwritings other than those to which Pickard & Co. was presently irrevocably committed, and

6. Effect any new transactions for Pickard & Co.'s option conversion account and agreed to close out existing positions as related papers expired.

Shortly thereafter, the restriction having to do with trading for the account of Pickard & Co. was amended to permit a trading limit of not more than $100,000 covering transactions which were not of a "riskless" nature.

A subsequent visit by an Exchange Examiner disclosed:

1. A violation of Rule 325 on June 30, 1966, when capital failed to meet Pickard & Co.'s requirements by $32,781.

2. A violation of an agreement with the Exchange to maintain net capital of at least $25,000 in excess of minimum requirements or an amount which would provide a ratio of aggregate indebtedness to net capital of not more than 1500 percentum, whichever was the greater dollar "cushion."

3. A violation of Rule 402 in failing to segregate customers' securities properly and promptly.

4. A violation of SEC Rule 240.8c-1 in commingling customers' securities in bank loans without the written consent of each customer.

5. A violation of Rule 405(3) in failing to approve in writing the opening of new accounts.

In connection with these violations, John Pickard and Peter Pickard, allied members, and Warren C. Grunden, Pickard & Co.'s Exchange member at the time, appeared before the Advisory Committee on February 7, 1967. Each one of them and the other voting stockholders of Pickard & Co. were severely censured for the violations which had occurred, and the corporation was fined $5,000 for the reported violations. The Committee also continued until further notice the special restrictions heretofore mentioned.

The censure closed with a statement that "Should there be any evidence in the future of your inability to conduct your corporation's affairs in accordance with the Rules and Regulations to which it is subject, it may result in formal proceedings before the full Board of Governors leading to suspension or expulsion." All of the present allied members of the corporation received a copy of such censure, except Mr. John A. Schwarz, Jr., Exchange member, who was not associated with the corporation at the time.

On March 30, 1967, the National Association of Securities Dealers, Inc. determined to censure Pickard & Co. and to impose a fine of $3,000. This action was taken as a result of the NASD's finding that Pickard & Co. was guilty of the following violations in the period June, 1965, through June, 1966:

1. Failed to register certain employees
2. Excessive markups on principal transactions with customers

3. Regulation T in failing to cancel or otherwise liquidate 18 purchases in customers' special cash accounts where full cash payment had not been obtained within the statutory period

4. The "freeze" provisions of Regulation T

5. SEC Rules 17a-3 and 4 in failing to maintain current and accurate records involving customers' ledger accounts, stock record, fail to receive and deliver record, and order records

6. NASD rules relating to supervisory procedures

Basis for Charges

Pickard & Co. was scheduled to submit to the Exchange on October 30, 1967, an answer to a regular financial questionnaire based on an audit of its affairs by Haskins & Sells as of September 30, 1967. Pickard & Co. requested three extensions within which to submit the questionnaire answer. On December 11, 1967, further extension was requested but was not granted by the Exchange. By the early part of February, 1968, it was apparent to the Exchange that the condition of the back office operations of Pickard & Co. was such that a delivery of all customers' accounts to other firms was indicated. At the request of John Pickard, the Exchange provided a number of its own employees to assist in the delivery of customers' accounts to other member organizations. It soon became apparent that because of the shortage of cash capital on the part of Pickard & Co., it might be necessary to employ funds from the Exchange's Special Trust Fund to accomplish delivery of customers' accounts. An agreement was entered into between the Exchange and Pickard & Co. setting forth various conditions under which Special

Trust Fund funds would be used, including the right of the Exchange to appoint a Liquidator in its discretion. A Liquidator was, in fact, appointed effective May 21, 1968, and Pickard & Co. is currently in the process of liquidation under his direction.

The Charges which follow are based upon information developed by Haskins & Sells, by Exchange Examiners, and from conversations had with various officers and employees of Pickard & Co.

PART II

Fraud or Fraudulent Acts - Conduct Inconsistent with Just and Equitable Principles of Trade

A. Loans to Anglo-American Properties

At the time Pickard & Co. was admitted to Exchange membership John and Peter Pickard were the owners of Pickard Limited Incorporated, a real estate holding company. Shortly thereafter the name was changed to Anglo-American Properties to avoid possible confusion with the new member corporation. From time to time the Pickards borrowed money from Anglo-American for the purpose of acquiring additional capital stock of Pickard & Co. John and Peter Pickard also arranged for Pickard & Co. to lend money to Anglo-American, which loans totaled approximately $318,000 by June, 1966. At the time such loans were made, it was without the knowledge or consent of the other directors of Pickard & Co.

On June 20, 1966, Anglo-American filed a petition for reorganization under Chapter X of the Bankruptcy Act and a trustee was

appointed. On June 16, 1966, the Pickards, upon the insistence of the other directors, entered into an agreement with Pickard & Co. in connection with the indebtedness of Anglo-American. Pursuant to this agreement, the Pickards redeemed 1000 shares of their capital stock in Pickard & Co., the member corporation. The proceeds of $100,000 were applied to reduce the Anglo-American debt to Pickard & Co. In addition, the Pickards agreed to the assignment to them of the remaining Anglo-American indebtedness and to give their joint note payable in five years to Pickard & Co. for the indebtedness. To secure payment of this note the Pickards turned over to Pickard & Co. the remainder of their capital stock in Pickard & Co. totaling 4471 shares. Provision was made that the Pickards would have the right to redeem 2241 shares at any time and retain the proceeds for their own personal use or to apply the proceeds toward the reduction of the debit balances in their "officer accounts". A further proviso was that if the Pickards became bankrupt, insolvent or unable to meet their debts as they became due, their capital stock in the member corporation could be redeemed and the proceeds applied to the satisfaction of the outstanding note. Meanwhile, the Pickards retained all voting rights on their shares.

B. Cash Withdrawals

Each officer of Pickard & Co. had on the books of the corporation an "officer account". The apparent purpose of these accounts was to reflect salary compensation of the officers against which they drew funds for personal expenses and various other expenditures.

On January 31, 1966, the officer account of John Pickard had a credit balance of approximately $1,500. By June 20, 1966, there was a debit of some $37,000. Thereafter, the debit continued to mount until the debit was about $156,000 in February, 1968.

On January 31, 1966, the officer account of Peter Pickard had a credit balance of approximately $1,800. By June 20, 1966, there was a debit of approximately $18,000. Thereafter the debit continued to mount until the debit was about $83,000 in February, 1968.

These withdrawals by John and Peter Pickard were made without the knowledge of the other officers and directors of Pickard & Co. or of the subordinated lenders and non-voting stockholders.

C. Stock Redemptions

By January 1, 1968, the holdings of John and Peter Pickard in Pickard & Co. stood at 4037 shares of voting stock. The wife of John Pickard held a total of 1606 shares of non-voting stock in Pickard & Co. Beginning on January 2, 1968, $39,500 worth of her non-voting shares were redeemed. The wife of Peter Pickard held a total of 1364 shares of non-voting stock in Pickard & Co. Beginning on January 2, 1968, $34,500 worth of her non-voting shares were redeemed. John and Peter Pickard claim such redemptions were approved at a directors' meeting purportedly held on January 2, 1968. Minutes authorizing such redemptions were written. However, no such meeting was held and the redemptions were effected without the knowledge or consent of the directors, other than John and Peter Pickard.

D. Unauthorized Use of Pickard & Co.'s Funds for Personal Purposes

On or about July 20, 1966, John and Peter Pickard jointly borrowed $50,000 from the Pineland State Bank of Brick Town, New Jersey, which sum was used to acquire additional shares of the voting stock of Pickard & Co., 275 shares by John Pickard and 225 shares by Peter Pickard. This borrowing continued to exist unchanged until approximately January 20, 1968, when John Pickard caused a $10,000 reduction in the loan by directing the Pineland State Bank to charge this amount against the Pickard & Co. account at that bank. John Pickard contends that he then instructed James R. Hanlon, the firm's Controller, to charge his officer account with $5,500 and that of his brother, Peter, with $4,500. Hanlon denies having received any such instructions and no charge has been made against the officer accounts to date. On January 20, 1968, there was a debit balance of about $150,000 in John Pickard's officer account and a debit balance of about $83,000 in Peter Pickard's officer account. John Pickard further contends that it was the intention to cover these charges to his officer account and that of his brother by having their respective wives redeem $10,000 worth of non-voting stock, and to use the resulting proceeds for the purpose. He also claims that he personally prepared minutes of a directors' meeting to reflect these redemptions. No such minutes are available. Moreover, no officer or director, other than John and Peter Pickard, had knowledge of the situation.

Improper Use of Pickard & Co. Funds

Franklin Investment Corporation (Franklin) is a company which, until November, 1967, was wholly owned by Audrey and Alison Sackville-Pickard. Audrey Pickard is John Pickard's wife and Alison Pickard is Peter Pickard's wife. The corporation's sole asset is an apartment house complex in Tulsa, Oklahoma. The property had been acquired in 1966 by Franklin assuming an outstanding $4 million mortgage on the property. The sole investment made in the corporation by Audrey and Alison Sackville-Pickard was a cash contribution of $5,000. On November 2, 1967, without the knowledge of the other officers and directors of Pickard & Co. the Pickard brothers caused Pickard & Co. to pay Franklin $12,000 for which it was to receive 12,000 shares of Franklin representing approximately 1/50th of the outstanding stock. The $12,000 was used by Franklin to pay the ad valorem tax on the property for the first half of 1966.

F. Unauthorized Compensation to Wives

As of September 14, 1967, Audrey Sackville-Pickard owned 1230 shares of non-voting stock of Pickard & Co. representing an investment of $123,000. As of the same date, Alison Sackville-Pickard owned 1070 such shares, representing an investment of $107,000. On September 14, 1967, John Pickard instructed the firm's controller to prepare checks payable to the wives representing interest at the rate of 7% per annum on their equity for a period of three months. Accordingly, on that date, Audrey and Alison Sackville-Pickard were paid checks by the firm in the amounts of $2,152.50 and $1,872.48 respectively. Each month thereafter, through

...nuary, 1968, the wives continued to receive checks representing that month's payment at the rate of 7% per annum on their equity in the firm. The total payments made in this manner amounted to approximately $9,400. (Although the non-voting shares owned by the wives increased by 230 shares and 170 shares respectively on December 1, 1967, there was no increase in the monthly payments made to them after that date.)

These payments were charged to the firm's "general expense" account, and were made without the knowledge or approval of the officers and directors of Pickard & Co., other than John and Peter Pickard. Furthermore, no similar payments were made to the other non-voting stockholders of the firm.

As a result, aside from Anglo-American loans, John and Peter Pickard arranged for and accomplished a series of steps involving interest payments, loan repayment, advances, stock redemption and compensation, all without authorization resulting in aggregate withdrawals from the firm of approximately $344,000, all without the knowledge of the other officers and directors. While some transfers were accomplished over a period of many months, an unusual number of the steps occurred in January and February 1968 immediately prior to the Exchange's stepping into the picture, and at a time when Pickard & Co. was experiencing severe operations problems.

PART III

Misstatement to the Board of Governors Upon a Material Point

In the course of the staff's inquiry into this matter, three members of the staff, under authority delegated to them by the Board of

rnors through the President, interrogated John Pickard, after advising
m that any statements made by him in the course of the interrogation
re the same as statements made to the Board itself. Among other things,
was asked about the basis for the above-described payments made to
drey and Alison Sackville-Pickard during the latter part of 1967. He
plied that these payments were compensation for filing and typing done
n their homes, and were based solely on the work performed. When asked
hether there was any connection between the wages paid to the wives and
heir investment in the firm, he said that there was not, and further
stated that "We don't give any of our stockholders dividends."

Mr. Pickard was then shown two slips of paper on which he had written instructions to Pickard & Co.'s controller to prepare checks for two of the monthly payments to Audrey and Alison Sackville-Pickard. One of these read in part, "....for latest period on common stock on same basis as last payment" and the other read in part, "....7% on equity." At this point, Mr. Pickard stated that he felt that the wives' compensation for their work should be equal to at least a percentage on their interest in Pickard & Co. When asked why he had previously denied the relationship between the payments to the wives and their equity, he stated that his earlier answer had not been substantially different from his second explanation; that the wives felt they should receive a 5, 6 or 7 percent return on their investment; and that they did work for Pickard & Co. in order to receive that return. He concluded, however, by saying that the compensation was determined by the amount of work done. (Extracts of pertinent testimony attached as Exhibit A.)

PART IV

Capital Requirements

Pickard & Co.'s independent public accountants, Haskins & Sells started a "surprise" audit of the corporation's affairs as of September 30, 67. It was realized immediately by Haskins & Sells that the corporation's oks and records were not posted to the current date and, in fact, the stock cord as of the date of audit was incomplete. Because of the condition of e records it was not possible to complete the audit and submit answers p a regular financial questionnaire within the 30 day period which at that ime was ordinarily given for such purpose. A number of extensions were anted until finally it was determined that no further extensions should be iven. The corporation's answers to the regular financial questionnaire emained outstanding without the benefit of an extension from December 11, 1967, to May 9, 1968. During the earlier dates when extensions were requested in connection with the September 30, 1967, financial questionnaire, John Pickard had in each instance stated that "There is nothing in the affairs of Pickard & Company, Incorporated which we believe would impair our capital as of the date of the questionnaire or as of the present date." The Accountant's Certificate dated February 7, 1968, submitted by Haskins & Sells in connection with the September 30, 1967, audit stated "Because we were not able to make an examination of the accompanying answers to Financial Questionnaire (Part I) and the accompanying Schedules (Parts II and III) in accordance with generally accepted auditing standards, we are not in a position to express, and do not express, any opinion on them."

An analysis of the answers to the financial questionnaire submitted by Haskins & Sells in behalf of Pickard & Co. disclosed the following capital position as of September 30, 1967:

Net Worth		$ 2,490,103
Aggregate Indebtedness		10,219,000
Net Capital Deficit		288,518
Net Capital Required at 2000%		511,000
Net Capital Required at 1500%		681,000
Below Capital Requirements at 2000% by		799,518
Below Capital Requirements at 1500% by		969,518
Firm Commitments		
30% -	$1,156,000	
15 -	11,000	
7½ -	18,000	
4 -	15,000	
2 -	71,000	1,374,000

In this analysis a charge of $452,600 was made against capital for short security differences in the stock record. A charge in the amount of $294,680 was also made for unlocated differences between detailed subsidiary records and general ledger control accounts for securities failed to deliver and failed to receive. However, even without these charges Pickard & Co. was in violation by $52,238 on the basis of the 2000% requirement and by $222,238 on the basis of the 1500% requirement.

PART V

Regulation T - Exchange Rule 432

An analysis of 73 customers' accounts on the books of Pickard & Co. disclosed numerous violations of Regulation T. Some of these accounts were analyzed because they were known to have contained violations, while others were selected at random. These were the only accounts analyzed.

Regulation T provides in pertinent part that in a special cash account a broker may purchase any security for a customer provided that funds for the purpose are held in the account or the purchase is made in reliance upon an agreement accepted by the broker in good faith that the customer will promptly make full cash payment for the security, and that the customer does not contemplate selling the security prior to making such payment. In the event payment is not received within seven business days, the broker must cancel or otherwise liquidate the transaction. In exceptional circumstances the broker may request from a national securities exchange an extension of the statutory seven day period.

A review of 47 cash accounts disclosed 174 instances where payment for purchases in the period January 1, 1967, through February, 1968, was not obtained within the seven day period. Extensions of time were not obtained and in the great majority of instances liquidation was not effected for from ten days to over one year after it was required by the provisions of the Regulation. As a matter of fact, Pickard & Co. had requested no extensions of time in connection with cash or margin accounts since October, 1967.

Section 4(c)(8) of Regulation T provides that in any instance where a security purchased in a special cash account has been sold prior to payment being made no further purchases may be made for a period of 90 days unless payment therefor is obtained from the customer in advance. Eighteen violations of this Section were noted in connection with 6 of the 47 above-mentioned special cash accounts.

Section 3 of Regulation T which deals with margin accounts provides that margin required as a result of transactions must be obtained within five (formerly four) business days. Provision is made in exceptional circumstances for obtaining an extension of this period from a national securities exchange or association. In the absence of such an extension, Regulation T requires liquidation in an amount sufficient to meet the margin requirement.

A review of 26 margin accounts disclosed 271 violations in the period January 1, 1967, through February, 1968, involving failure to obtain required margin within the prescribed period. Extensions of time were not requested nor was liquidating action taken.

Section 3 of Regulation T also prohibits withdrawal of cash or securities from restricted margin accounts, i.e., accounts in which the debit balance exceeds the maximum loan value. There were 26 instances of such violative withdrawals among the above-mentioned 26 accounts.

NYSE Rule 432(a) requires that a daily record be maintained reflecting amounts of margin required under Exchange or Federal regulations and the time when and manner in which such margin is furnished or obtained. No such record had been maintained by Pickard & Co. for many months prior to February, 1968.

Rule 432(b) prohibits a member organization from permitting a customer to make a practice of meeting margin calls by liquidation. It was noted that in ten customer accounts the majority of margin calls were met by liquidation.

PART VI

Failure to Segregate Securities

Exchange Rule 402 provides in pertinent part that a member organization may not pledge securities carried for the account of a customer for an amount which is not fair and reasonable in view of the indebtedness of the customer. Simply stated this means that customers' fully owned securities and securities representing excess margin must be segregated. The financial questionnaire answer of Pickard & Co. as of September 30, 1967, indicates that as of that date $578,449 worth of customers' free or excess margin securities were pledged in bank loans.

PART VII

Non-currency of Records

Exchange Rule 440 provides that member organizations doing business with the public are required to make and keep current the various records specified by Rules 17a-3 and 17a-4 of the SEC. The following deficiencies in the records of Pickard & Co. were noted:

When Haskins & Sells commenced its audit on September 29, 1967, Pickard & Co. customers' ledgers had not been posted for from two to three weeks, there was no up-to-date stock record, and general ledger postings were one month behind. When Exchange supervisory personnel were assigned to assist Pickard & Co. in February, 1968, they noted that:

1. Customers' ledger accounts were three weeks behind in posting and contained numerous erroneous entries

2. Margin records were from four to six weeks behind in posting

3. The Stock Record was partially posted to January 17, 1968, and contained numerous errors

4. Dividend records were incomplete for a long period of time

5. Money balances in bank loans did not agree with general ledger balances and the details of securities pledged as collateral were not currently posted in the bank collateral records

6. Failed to receive and failed to deliver detail units were not in agreement with general ledger control figures

7. The general ledger was approximately one month behind in posting and subsidiary records did not agree with totals in the general ledger accounts

PART VIII

Lack of Good Business Practice

As a result of the audit by Haskins & Sells, it was shown that Pickard & Co. had not conducted its affairs in accordance with the principles of good business practice. The firm had not reconciled its cashiers detailed subsidiary files of "fail to receive" and "fail to deliver" to the general ledger for over six months prior to the time of the audit. When the general ledger figures were brought up to date it was determined that the details for both "fail to receive" and "fail to deliver" did not agree with the general ledger control accounts. In addition, differences existed in Pickard & Co.'s omnibus accounts with other brokers. Bring-downs of these accounts had not been made by the firm since April 30, 1967, and statements received from the brokers carrying the omnibus accounts had not been reconciled to Pickard & Co.'s records since that date. When the stock

cord was brought up to date it consisted of approximately 1,000 customer ccounts and 2,000 securities in the stock record. A test check indicated pproximately 12,500 differences. Pickard & Co.'s bank accounts had not een reconciled to general ledger balances for six months. Poor internal ontrol was evidenced by:

1. Inadequate separation of duties between personnel in that personnel having access to cash and securities also had access to related records

2. Inadequate number of competent supervisory personnel

3. Inadequate physical safeguards over securities in that employees had access to security storage and working areas and access to margin records and records relating to customer accounts

4. Margin records not being currently maintained and personnel in the margin department who were also registered representatives. Lack of available records for the determination of segregation requirements, for margin calls to customers, or for extensions, if any, required under Federal Reserve Regulation T

5. No fixed procedures for branch accounting or security movements

6. Segregation records not being currently maintained

7. No management reporting system through which management could control the operations of Pickard & Co.

Exchange supervisory personnel assigned to assist Pickard & Co. in February, 1968, also noted that:

1. P & S blotters for the months of January and February had not been balanced for any single day

2. Cash blotters had not been balanced for any single business day for the months of January and February and such blotters were replete with errors

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3. Omnibus accounts carried by the firm had not been reconciled for months

4. Active bank accounts had not been reconciled since the cut off of reconciliations prepared by Haskins & Sells in connection with the September 30, 1967, audit.

CHARGE I

John Pickard, by reason of the facts set forth in PART II of the STATEMENT OF FACTS, is guilty of fraud or of fraudulent acts and is subject to discipline under Section 1 of Article XIV.

CHARGE II

Peter Pickard, by reason of the facts set forth in PART II of the STATEMENT OF FACTS, is guilty of fraud or of fraudulent acts and is subject to discipline under Section 1 of Article XIV.

CHARGE III

John Pickard, by reason of the facts set forth in PART II of the STATEMENT OF FACTS guilty of conduct inconsistent with just and equitable principles of trade and is subject to discipline under Section 6 of Article XIV.

CHARGE IV

Peter Pickard, by reason of the facts set forth in PART II of the STATEMENT OF FACTS, is guilty of conduct inconsistent with just and equitable principles of trade and is subject to discipline under Section 6 of Article XIV.

CHARGE V

John Pickard, by reason of the facts set forth in PART III of the STATEMENT OF FACTS, is guilty of making a misstatement to the Board of Governors on a material point and is subject to discipline under Section 5 of Article XIV.

CHARGE VI

Pickard & Co., by reason of the facts set forth in PART IV of the STATEMENT OF FACTS, violated Rule 325 and under the provisions of Section 16 of Article XIV of the Constitution, John Pickard, Peter Pickard, Joseph V. Shields, Jr., Albert E. Posener, Hayes A. Noel, Jr., and John A. Schwarz, Jr. are subject to discipline under Section 6 of Article XIV.

CHARGE VII

Pickard & Co., by reason of the facts set forth in PART V of the STATEMENT OF FACTS, wilfully violated Regulation T, and under the provisions of Section 16 of Article XIV of the Constitution, John Pickard, Peter Pickard, Joseph V. Shields, Jr, Albert E. Posener, Hayes A. Noel, Jr., and John A. Schwarz, Jr. are subject to discipline under Section 7 of Article XIV.

CHARGE VIII

Pickard & Co., by reason of the facts set forth in PART V of the STATEMENT OF FACTS, violated Rule 432, and under the provisions of Section 16 of Article XIV of the Constitution, John Pickard, Peter Pickard, Joseph V. Shields, Jr., Albert E. Posener, Hayes A. Noel, Jr., and John A. Schwarz, Jr., are subject to discipline under Section 6 of Article XIV.

CHARGE IX

Pickard & Co., by reason of the facts set forth in PART VI of the STATEMENT OF FACTS, violated Rule 402, and under the provisions of Section 16 of Article XIV of the Constitution, John Pickard, Peter Pickard, Joseph V. Shields, Jr., Albert E. Posener, Hayes A. Noel, Jr., and John A. Schwarz, Jr. are subject to discipline under Section 6 of Article XIV.

CHARGE X

Pickard & Co., by reason of the facts set forth in PART VII of the STATEMENT OF FACTS, violated Rule 440, and under the provisions of Section 16 of Article XIV of the Constitution, John Pickard, Peter Pickard, Joseph V. Shields, Jr., Albert E. Posener, Hayes A. Noel, Jr. and John A. Schwarz, Jr. are subject to discipline under Section 6 of Article XIV.

CHARGE XI

Pickard & Co., by reason of the facts set forth in PART VIII of the STATEMENT OF FACTS, violated Rule 401, and under the provisions of Section 16 of Article XIV of the Constitution, John Pickard, Peter Pickard, Joseph V. Shields, Jr., Albert E. Posener, Hayes A. Noel, Jr., and John A. Schwarz, Jr. are subject to discipline under Section 6 of Article XIV.

Robert M. Bishop
Director

Rule 325. (a) No member or member organization doing any business with others than members or member organizations or doing a general business with the public, except a member or member organization subject to supervision by State or Federal banking authorities, shall permit, in the ordinary course of business as a broker, his or its Aggregate Indebtedness to exceed 2000 per centum of his or its Net Capital, which Net Capital shall be not less than $50,000 in the case of a member organization carrying any accounts for customers and shall be not less than $25,000 in the case of any other member or member organization subject to this rule, unless a specific temporary exception is made by the Exchange in the case of a particular member or member organization due to unusual circumstances.

The initial Net Capital of a member corporation shall be at least 120% of the Net Capital required to be maintained by this rule.

The Exchange may at any time or from time to time in the case of a particular member or member organization prescribe greater requirements than those prescribed herein.

Each member or member organization shall promptly notify the Exchange if his or its Net Capital does not equal or exceed the minimum required by this rule.

Rule 401. Every member, allied member and member organization shall at all times adhere to the principles of good business practice in the conduct of his or its business affairs.

Rule 402. (a) No agreement between a member organization and a customer authorizing the member organization to pledge securities carried for the account of the customer either alone or with other securities, either for the amount due thereon or for a greater amount, or to lend such securities, shall justify the member organization in pledging or lending more of such securities than is fair and reasonable in view of the indebtedness of said customer to said member organization, except as provided in paragraph (d) of this Rule.

Agreements for Use of Customers' Securities

(b) No member organization shall lend, either to itself as broker or to others, securities held on margin for a customer and which may be pledged or loaned under paragraph (a) hereof, unless such member organization shall first have obtained a separate written authorization from such customer permitting the lending of such securities by such member organization.

Restrictions on Delivery of Customers' Securities

(c) No general agreement between a member organization and a customer shall justify the member organization in delivering securities carried for the customer on sales made by the member organization for any account in which such member organization or any partner thereof or stockholder therein is directly or indirectly interested.

Free or Excess Margin Securities

(d) No securities held by a member organization for the account of a customer, whether free or representing excess margin, may be loaned to itself as broker, or to others, or delivered on sales made by the member organization for any account in which the organization or any partner or stockholder has a direct or indirect interest unless a specific written agreement designating the particular securities to be loaned is first obtained from the customer.

• • • *Supplementary Material:*

Segregation of Securities

.10 Wholly-owned and excess margin securities—Individual identification.—When a member organization holds securities that have been fully paid for or holds securities in excess of the amount which can be pledged under Rule 402, above, such securities should be segregated and marked in a manner which clearly identifies the interest of each individual customer. When such securities are in the actual custody of the organization, this may be

accomplished by placing them in separate envelopes bearing the customers' names or by attaching tags or labels, similarly marked, to the securities or by some other means which produces the same result. The date as of which a particular certificate is segregated should be clearly indicated either on the tag, label or envelope bearing the customer's name. When such securities are not in the actual custody of the organization, their location and the means by which they may be identified as belonging to the customers should be indicated on the books of the organization. The foregoing applies both to odd lots and full lots.

.20 Wholly-owned and excess margin stocks—Suggested bulk method.—Any member organization adopting the following method of segregation should notify the Department of Member Firms.

Rule 432. (a) Each member organization carrying securities margin accounts for customers shall make each day a record of every case in which, pursuant to the rules of the Exchange or regulations of the Board of Governors of the Federal Reserve System, initial or additional margin must be obtained in a customer's account because of the transactions effected in the account on that day. The record shall be preserved for at least twelve months, and shall show, for each account, the amount of margin so required and the time when and manner in which the margin is furnished or obtained. The record shall be maintained in a manner satisfactory to the Exchange.

Margin met by liquidation

(b) No such organization shall permit a customer to make a practice of effecting transactions requiring such initial or additional margin and then furnishing the margin by liquidation of the same or other commitments; except that the provisions of this paragraph (b) shall not apply to any account maintained for another broker or dealer in which are carried only the commitments of the customers of the other broker or dealer exclusive of his partners or stockholders, provided the other broker or dealer

(1) Is a member organization, or

(2) has agreed in good faith with the member organization carrying the account that he will maintain a record equivalent to that referred to in paragraph (a) of this Rule, or

(3) is not subject to the regulations of the Board of Governors of the Federal Reserve System.

Rule 440. Every individual member and every member organization shall make and preserve for at least three years such books and records as the Exchange may prescribe.

• • • *Supplementary Material:*

.10 Business transacted with members and member organizations.—An individual Exchange member or a member organization transacting business solely with members or member organizations shall make and preserve for at least three years records supporting all income and expenses relating to securities and commodities and details of all transactions in securities and commodities for any account in which such member or organization has an interest.

Those records shall consist, at least, of the following:

(1) Bank statements, cancelled checks and information as to source of deposits;

(2) statements of account and confirmations received from others;

(3) records reflecting assets and liabilities, income and expenses and proprietary interests; and

(4) copies of all reports rendered to any regulatory body including national securities exchanges and state and federal authorities.

(*See Rules* 121 *and* 123 [¶ 2121, 2123] *for records of orders to be kept by Exchange members. See Rule* 410 [¶ 2410] *for records of orders to be kept by member organizations.*)

20 Business transacted with others than members and member organizations.—A member organization transacting business directly with others than members or member organizations shall make and preserve the records prescribed by Regulations §§ 240.17a-3 [¶ 4583] and 240.17a-4 [¶ 4584] of the Securities and Exchange Commission.

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[Types of Books and Records Required]

(a) Every member of a national securities exchange who transacts a business in securities directly with others than members of a national securities exchange, and every broker or dealer who transacts a business in securities through the medium of any such member, and every broker or dealer registered pursuant to section 15 of the Securities Exchange Act of 1934, as amended, (48 Stat. 895, 49 Stat. 1377, 52 Stat. 1075; 15 U. S. C. 780) shall make and keep current the following books and records relating to his business:

(1) Blotters (or other records of original entry) containing an itemized daily record of all purchases and sales of securities, all receipts and deliveries of securities (including certificate numbers), all receipts and disbursements of cash and all other debits and credits. Such records shall show the account for which each such transaction was effected, the name and amount of securities, the unit and aggregate purchase or sale price (if any), the trade date, and the name or other designation of the person from whom purchased or received or to whom sold or delivered.

(2) Ledgers (or other records) reflecting all assets and liabilities, income and expense and capital accounts.

(3) Ledger accounts (or other records) itemizing separately as to each cash and margin account of every customer and of such member, broker or dealer and partners thereof, all purchases, sales, receipts and deliveries of securities and commodities for such account and all other debits and credits to such account.

(4) Ledgers (or other records) reflecting the following:

(i) Securities in transfer;

(ii) Dividends and interest received;

(iii) Securities borrowed and securities loaned;

(iv) Monies borrowed and monies loaned (together with a record of the collateral therefor and any substitutions in such collateral);

(v) Securities failed to receive and failed to deliver.

(5) A securities record or ledger reflecting separately for each security as of the clearance dates all "long" or "short" positions (including securities in safekeeping) carried by such member, broker or dealer for his account or for the account of his customers or partners and showing the location of all securities long and the offsetting position to all securities short and in all cases the name or designation of the account in which each position is carried.

(6) A memorandum of each brokerage order, and of any other instruction, given or received for the purchase or sale of securities, whether executed or unexecuted. Such memorandum shall show the terms and conditions of the order or instructions and of any modification or cancellation thereof, the account for which entered, the time of entry, the price at which executed and, to the extent feasible, the time of execution or cancellation. Orders entered pursuant to the exercise of discretionary power by such member, broker or dealer, or any employee thereof, shall be so designated. The term "instruction" shall be deemed to include instructions between partners and employees of a member, broker or dealer. The term "time of entry" shall be deemed to mean the time when such member, broker or dealer transmits the order or instruction for execution or, if it is not so transmitted, the time when it is received.

(7) A memorandum of each purchase and sale of securities for the account of such member, broker or dealer showing the price and, to the extent feasible, the time of execution.

(8) Copies of confirmations of all purchases and sales of securities and copies of notices of all other debits and credits for securities, cash and other items for the account of customers and partners of such member, broker or dealer.

(9) A record in respect of each cash and margin account with such member, broker or dealer containing the name and address of the beneficial owner of such account and, in the case of a margin account, the signature of such owner: *Provided*, That, in the case of a joint account or an account of a corporation, such records are required only in respect of the person or persons authorized to transact business for such account.

(10) A record of all puts, calls, spreads, straddles and other options in which such member, broker or dealer has any direct or indirect interest or which such member, broker or dealer has granted or guaranteed, containing, at least, an identification of the security and the number of units involved.

(11) A record of the proof of money balances of all ledger accounts in the form of trial balances, and a record of the computation of aggregate indebtedness and net capital, as of the trial balance date, pursuant to Rule 15c3-1; *provided, however*, (i) that such computation need not be made by any member, broker or dealer unconditionally exempt from Rule 15c3-1 by subparagraph (b)(1) or (b)(3), thereof; and (ii) that any member of an exchange whose members are exempt from Rule 15c3-1 by subparagraph (b)(2) thereof shall make a record of the computation of aggregate indebtedness and net capital as of the trial balance date in accordance with the capital rules of at least one of the exchanges therein listed of which he is a member. Such trial balances and computations shall be prepared currently at least once a month. [As amended effective March 1, 1967, Release No. 34-8023, 32 F. R. 864.]

¶ 4584 § 240.17a-4

[Six-Year Records]

(a) Every member, broker and dealer subject to § 240.17a-3 shall preserve for a period of not less than 6 years, the first 2 years in an easily accessible place, all records required to be made pursuant to § 240.17a-3(a)(1), (2), (3), and (5).

[Three-Year Records]

(b) Every such member, broker and dealer shall preserve for a period of not less than 3 years, the first 2 years in an easily accessible place:

(1) All records required to be made pursuant to § 240.17a-3(a)(4), (6), (7), (8), (9), and (10).

(2) All check books, bank statements, cancelled checks and cash reconciliations.

(3) All bills receivable or payable (or copies thereof), paid or unpaid, relating to the business of such member, broker or dealer, as such.

(4) Originals of all communications received and copies of all communications sent by such member, broker or dealer (including interoffice memoranda and communications) relating to his business as such.

(5) All trial balances, computations of aggregate indebtedness and net capital (and working papers in connection therewith), financial statements, branch office reconciliations, and internal audit working papers, relating to the business of such member, broker or dealer, as such. [As amended effective March 1, 1967, Release No. 34-8023, 32 F. R. 864.]

(6) All guarantees of accounts and all powers of attorney and other evidence of the granting of any discretionary authority given in respect of any account, and copies of resolutions empowering an agent to act on behalf of a corporation.

(7) All written agreements (or copies thereof) entered into by such member, broker or dealer relating to his business as such, including agreements with respect to any account.

EXHIBIT A

EXTRACTS FROM TESTIMONY GIVEN BY JOHN SACKVILLE-PICKARD
BEFORE THE EXCHANGE STAFF ON JUNE 28, 1968

MR. MARCUS:

I'd like to advise you that the Board of Governors has delegated to the members of the staff present here today the authority to require members, allied members and employees of members and member organizations to appear and testify in connection with investigations. Any statements you may make to us today are the same as statements made by you to the Board of Governors itself.

I would also like to advise you that a member or allied member who is adjudged guilty by the affirmative vote of a majority of the Governors then in office of making a misstatement upon a material point to the Board of Governors may be suspended or expelled as the Board may determine.

Do you understand that?

MR. PICKARD: Yes.

* * * * *

BY MR. MARCUS:

Q. Are you familiar with payments made to your wife and your brother's wife by the firm during the latter part of 1967?

A. Yes, I am.

Q. Can you tell me what those were for?

A. They were for the work that our wives did on, I suppose, typing and filing.

Q. Filing where?

A. In Pennsylvania.

Q. What would they be filing there?

A. Oh, order tickets, transfer tickets, records. I used to take a load of work home every weekend.

Q. What would order tickets be doing at your home?

A. What would what?

Order tickets being doing at your home?

Order tickets?

Yes. That's what you just said, isn't it?

Yes. Anything that had to be punched and filed.

Specifically what did they do with the order tickets? Can you explain that to me a little more? I don't understand that.

Possibly, I don't think we took order tickets; it was anything that needed punching or alphabetizing for records.

Could you tell me how much time they spent on this each month?

A great deal of time.

How much is a great deal?

All of their, I suppose, available time when they weren't housekeeping. I got to the point I believe in the middle of 1966 that we couldn't even get help to alphabetize or file or record, whatever you want to call it, or put checks in numerical order, that there was only one thing to do and that was to take the work home in cardboard cartons and have them do it.

How did you commute to work, by the way?

Car. I believe it started the middle of last summer, I think. I brought my two daughters up and my brother brought his daughter and we were at 40 Wall Street then, and I believe they worked for two weeks or three weeks respectively and my wife said she didn't like the children doing this, that it was making them tired, she didn't like them coming to work every day and she said, "Why don't you bring the work home? We'll do it at home." That's what we did.

Did your wives do typing as well, did you say?

My wife didn't; my brother's wife is a good typist.

What did she type, do you recall in general?

I suppose she typed letters for him.

And how did you fix or determine their compensation for these services?

Oh, I don't know. I think it was about -- I know at one time Mrs. Brewer used to do various things for us -- she was one of our original stockholders -- and I believe we used to give her about $700 a year, $600 or $700 a year. I don't think she did it in '67. I tried to get my wife to do it for the same but I think after a while she said it was worth $600 or $700 a month, the work they were doing, and that's what we paid them.

Was there any connection with the wages you were paying them and their stockholding or investment in the firm?

No.

None whatsoever?

No.

You're positive of that?

Surely.

It was fixed solely based upon the work they were doing?

Absolutely. We don't give any of our stockholders dividends.

* * * * *

Mr. Pickard, I am going to show you now a note in your handwriting -- I believe it is your handwriting and you can tell me in a minute if it is -- which says, "Cheques for Audrey CS-P Allison CS-P for latest period on common stock on same basis as last payment." Then it bears the initials, "JSP 10/10/67." Is that your handwriting?

Yes, it is.

Then I have another note which bears at the top of it the initials, "JRH," which I believe is Mr. Hanlon, and it has several items on it. I will read just the last two, "Check AS-P 7% on equity," and then over to the left of that in a different handwriting are the figures, "$717.50," and then below that another notation, "Check Allison S-P 7% on equity," and over to the left of that in another handwriting, "$624.16." Would you look at that, please (showing Mr. Pickard)?

Yes, yes.

could you explain these, in view of your testimony just a few minutes ago?

Yes. I felt the fact that if our wives did, in essence, work for the firm they would be equal to at least a percentage on their interest in the firm, let's put it that way.

Mr. Pickard, do you recall my earlier question and your earlier answer to it?

Yes, I do.

Whether these payments to your wives bore any relation to the shareholdings or investment in the firm; do you recall my asking you that, roughly that?

Yes.

And do you recall your answer to that question?

Yes.

How is it that you now tell me something substantially different from that?

Well, I am not telling you anything substantially different, I am telling you to the effect that they felt that if they couldn't get 5, 6, or 7 per cent interest on the stock in the firm then, in essence, they would have to do something to get it; and after all, they were paying interest on their loans and the only manner in which they could, say, pay their interest was to work for it to that extent.

Q. Didn't you just a few moments ago testify to me that they felt that their efforts, the work that they were doing for the firm, was worth at least $600 or $700 a month?

A. Yes.

Q. That was your testimony?

A. Yes.

Q. Now you are testifying they based the compensation they expected upon their investment in the firm; is that correct?

A. Well, let's say they wanted to earn $500, $600, $700 a month.

hey didn't care on what basis it was calculated?

As long as they worked for it.

Well, can you now give me the final ultimate answer to the series of questions I just posed to you? How was their compensation determined for the work that they were allegedly doing for the firm?

By the amount of work they did.

You are sure it wasn't by the amount of money that you or they might have needed?

No, because I don't think this correlates in any manner with what they held, unless you correlated it.

In fact, it does.

Does it?

Yes. It will come to about 7 per cent of their investment in the firm at this time.

Oh, yes.

hich was apparently your instructions to Mr. Hanlon, isn't that correct, Check AS-P 7% on equity."

hat's what it says there, yes.

hat did that mean?

hat meant the amount of work she'd done. If she'd done 8 per cent of he work, she would have gotten 8 per cent of her interest in the firm. f she'd done 10 per cent, she would have gotten 10 per cent. But she id the work and she was entitled to it.

Plaintiff's Statement Pursuant to Rule 9(g)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

AUBREY B. LANK, as Receiver of Pickard & Company, Incorporated, Plaintiff, - against - THE NEW YORK STOCK EXCHANGE, Defendant.	PLAINTIFF'S STATEMENT PURSUANT TO RULE 9(g) 71 Civ. 5525 (MEL)

Plaintiff asserts the following material facts as to which it contends there exists a genuine issue of facts to be tried with respect to the counterclaims which are the subject of defendant's motion for summary judgment:

1. The agreements dated February 13, 1968 and May 16, 1968, between the defendant New York Stock Exchange ("Exchange") and Pickard & Company, Incorporated ("Pickard") which form the basis for defendant's counterclaims were the product of duress exercised by the Exchange.

2. The amounts claimed by the Exchange in its counterclaims are in excess of the value of the services rendered and funds advanced by it to Pickard, if any.

Plaintiff does not admit the matters set forth in Items 4, 5, 6 and 9 of defendant's "Statement Pursuant to Rule 9(g)".

With respect to the causes of action set forth against the Exchange in the complaint, it is Plaintiff's position that the facts alleged therein have not been controverted by the

Exchange and that Plaintiff would be entitled to judgment thereon as a matter of law. The facts alleged in the complaint are supported by the Affidavits of Robert S. Carlson and Aubrey D. Lank, submitted in opposition to defendant's motion.

Dated: New York, New York
April 22 1975

Respectfully submitted,

SPENGLER CARLSON GUBAR & CHURCHILL

By: _____
(A Member of the Firm)

280 Park Avenue
New York, New York 10017
Attorneys for Plaintiff

Affidavit of Russell E. Brooks

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - - - - -x

AUBREY B. LANK, as Receiver of Pickard & Company, Incorporated,

Plaintiff,

-against-

THE NEW YORK STOCK EXCHANGE,

Defendant.

- - - - - - - - - - - - - - - - - - - -x

71 Civ. 5525 (MEL)

AFFIDAVIT

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

RUSSELL E. BROOKS, being duly sworn, says:

1. I am a member of the firm of Milbank, Tweed, Hadley & McCloy, attorneys for the defendant New York Stock Exchange, Inc. (the "Exchange"). I make this affidavit in support of the Exchange's motion to dismiss and for summary judgment. I have been involved in the defense of this action since its commencement in 1971.

2. Before defendant Exchange served its answer and counterclaims in this action, the attorneys for the parties engaged in negotiations looking toward the possibility of settlement. Those negotiations were not successful, and no agreement was ever reached.

3. In March of 1972, I received a letter from Robert Carlson whose firm represents the plaintiff. A copy of that letter is annexed hereto as Exhibit A. That letter confirms that despite the negotiations there was no agreement between the parties on the terms of a settlement. Indeed Mr. Carlson stated that the action would not be held in abeyance and that

he expected to be able to go to trial shortly. Upon receipt of that letter, the Exchange determined to proceed with the defense of the action and promptly filed its answer and counterclaims. At the same time the Exchange filed its response to the plaintiff's request for production of documents.

4. Thereafter no activity took place in this action until February of this year when the Court on its own motion struck the matter from its calendar. By letter of February 20, 1975, Mr. J. Edward Meyer III protested the Court's order. I responded by letter to this Court of February 25, 1975 setting forth the fact that there had been no agreement between the parties as erroneously represented by Mr. Meyer. A copy of that letter is annexed hereto as Exhibit B. The Court nevertheless restored the case to the calendar. The Exchange then brought on this motion to dismiss and for summary judgment. Plaintiff requested an adjournment of the motion. That adjournment was granted despite the opposition of the Exchange set forth in my letter to the Court of April 7, 1975, a copy of which is annexed hereto as Exhibit C.

5. Since the Court's order of February of this year dismissing the action, the plaintiff has continued to fail to prosecute this action. The only activity which has taken place was a spurious motion to compel the production of documents and the noticing of the deposition of an individual who is no longer employed by the Exchange. The motion to compel was made prior to compliance with local Rule 9(f). When that lack of compliance was pointed out to plaintiff by the Exchange, plaintiff filed a statement of his efforts to comply with Rule 9(f). That statement obviously indicates substantial agreement between the parties as to the production of certain documents. Nevertheless plaintiff

has made no effort to examine the documents about which there is agreement. Furthermore, the sole notice of deposition which the plaintiff has served designated an inappropriate person. Plaintiff was well aware that the person designated was not employed by the Exchange as that very individual has been a witness in its arbitration proceeding with the four subordinated lenders referred to in ¶ 4 of the Meyer affidavit. Plaintiff voluntarily withdrew the notice of deposition by letter to me of April 16, 1975. A copy of that letter is annexed hereto as Exhibit D. Plaintiff apparently has no inclination to prosecute this action diligently. It should be dismissed and the calendar closed.

Russell E. Brooks

Sworn to before me
April 30, 1975.

Richard C. Tufaro

RICHARD C. TUFARO
NOTARY PUBLIC, State of New York
No. 60-4031020 Qual. in Westchester Co.
Cert. Filed in New York County
Commission Expires March 30, 1977

Exhibit A to Brooks Affidavit—Letter Dated March 23, 1972 from Carlson to Brooks

ROTH, CARLSON, KWIT, SPENGLER & GOODELL
ATTORNEYS AT LAW
280 PARK AVENUE, NEW YORK, N.Y. 10017

MICHAEL ROTH
ROBERT S. CARLSON
KENNETH J. KWIT
SILAS SPENGLER
CHARLES E. GOODELL
LEONARD GUBAR
J. EDWARD MEYER III
JONATHAN H. CHURCHILL
JEROME M. LEWINE
CLARK J. GURNEY

GERALD RASKIN
BRUCE A. RICH
HARVEY SCHWARTZ
FRED J. HALSEY, JR.
RICHARD J. WELLS

TELEPHONE
MURRAY HILL 2-4444
CABLE "ROCKSCOURT"
TELEX: 127596

March 23, 1972

Re: Lank v. New York Stock Exchange

Russell E. Brooks, Esq.,
Milbank, Tweed, Hadley & McCloy,
1 Chase Manhattan Plaza,
New York, New York 10005.

Dear Mr. Brooks:

By now you will have received a stipulation executed by me extending the time of the defendant in the above matter to answer and to respond to the Rule 34 request to April 17, 1972.

I understand from your firm that the Exchange proposes to settle the above matter by withdrawing its claim as a general creditor provided it feels that its exposure to suits by the subordinated lenders of Pickard is substantially minimized by the results of the action brought by the receiver in Delaware against Federal Insurance Company. Since the determination of the Federal Insurance Company case may be so far in the future (should there be a trial and appeals), I have come to the conclusion that I cannot extend your time further. It is my view that the Exchange, on the basis of the information provided to it, should evaluate the situation and decide whether it wants to risk a settlement of the Federal Insurance case which may accomplish its ends or to litigate the above case. I do not feel that such an approach is unsound or will be too costly for, with the production of your documents and one or two depositions, I hope to be

able to notice the case for trial. Moreover, the risk you take in settling the above case prior to a determination of the Federal Insurance case, in my view, is minimal for, unless the settlement of the latter case results in substantial money to the Estate (and concomitant satisfaction of subordinated claims), the Exchange will probably not realize anything in its claim.

Sincerely yours,

Robert Carlson

Exhibit B to Brooks Affidavit—Letter Dated February 25, 1975 from Brooks to Judge Morris E. Lasker

Mr. Brooks/kat
9163-141

February 25, 1975

Re: Lank v. New York Stock Exchange
71 Civ. 5525 (MEL)

Hon. Morris E. Lasker
United States District Court
Foley Square
New York, New York 10007

Dear Judge Lasker:

I am in receipt of a letter dated February 20, 1975 addressed to your Honor by J. Edward Meyer III, plaintiff's counsel, protesting your order of February 11, 1975 closing this action. I must take exception to the grounds on which plaintiff's protest is based.

First, plaintiff states that this action "is closely related to another case pending before the Southern District brought by the Stock Exchange against Aubrey Lank and raising similar issues of law and fact". This firm does, with rare exception, all of the litigation work for defendant New York Stock Exchange, Inc. I am unaware, and the Exchange itself is unaware, of any litigation in the Southern District of New York in which the New York Stock Exchange and plaintiff are parties, let alone a suit which the Exchange has commenced against Lank.

Plaintiff's counsel then states that "Counsel on both sides in both cases have an understanding that these cases will not be actively litigated because of a certain pending arbitration which is scheduled to be heard on March 25, 1975." Since I am unaware of any other case between the

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Exchange and Lank in this district, I find it difficult to respond to counsel's statement that there is an understanding that the two cases will not be actively litigated. I can, however, represent to your Honor that as the attorney in charge of this action for the Exchange, there is no understanding of any kind with plaintiff's counsel. I can also represent that I have inquired of Messrs. Potter, Anderson Carroon, the Exchange's local counsel in the Delaware receivership proceeding described in Mr. Meyer's letter to your Honor, and I have been advised by Potter, Anderson & Carroon that they are equally unaware of any understanding with plaintiff. As a matter of fact, at the time we received your Honor's order of February 11, 1975, closing this case, we were at work on motion papers seeking summary judgment dismissing pursuant to Rule 41(b), Federal Rules of Civil Procedure, among other authorities, the claims asserted by plaintiff herein and granting to the Exchange judgment on its counterclaim against the receiver for waste for bringing this frivilous action in the first place and dissipating receivership assets to which the Exchange has made a substantial claim in the Delaware receivership proceeding.

Plaintiff's counsel next refers to an arbitration which is pending. I can represent to your Honor that the Exchange is not party to any arbitration proceeding involving Mr. Lank, or the Pickard firm of which he is the Receiver.

I am further puzzled by the remark in counsel's letter that your Honor's order of February 11 does not constitute a dismissal, because we had put aside our work on the Exchange's motion for summary judgment in the belief that your order finally disposed of the action.

Apparently, Mr. Meyer is correct, because I have today received your Honor's letter of February 24, 1975 advising that the order of February 11 will be revoked. While ample authority exists for the Court to dismiss this action under Rule 23 of the Court's General Rules, under the circumstances, unless you advise to the contrary, we shall proceed with our plans to bring the matter before you by means of the motion on which we had been working prior to your February 11 order.

Respectfully submitted,

Russell E. Brooks

REB:kat
cc: Spengler Carlson Gubar
& Churchill
Potter, Anderson & Carroon

bcc: Ms. Bannerman
Mr. Wolf

Exhibit C to Brooks Affidavit—Letter Dated April 7, 1975 from Brooks to Judge Morris E. Lasker

MR. Broo ceb
File No. 9163-141

April 7, 1975

Re: Lank v. New York Stock Exchange
71 Civ. 5525 (MEL)

Hon. Morris E. Lasker
United States District Court
Foley Square
New York, N.Y. 10007

Dear Judge Lasker:

Defendant opposes plaintiff's application for a 30-day adjournment of defendant's motion for summary judgment.

This is a four-year old case and is eligible for treatment under the Court's task force program designed to bring such cases to trial before summer's end. Defendant's motion papers were timely served pursuant to the rules. Defendant's motion was made returnable on April 10 because that date was first chosen by plaintiff as the return date for his motion to compel discovery under Rule 37, and defendant believed that it would be advantageous to the parties and to the Court to have both motions before the Court at the same time. I note that plaintiff makes no request to have his motion adjourned. Defendant believes that deferral of its motion for 30 days, in view of the emergency procedures in effect in this Court as to old cases, will increase the risk that its motion for summary judgment may be ignored and the whole ball of wax set down for resolution at trial, as has occurred in the last two months in respect to other old cases subject to the task force program.

The reasons submitted in support of the requested 30-day adjournment are: Mr. Carlson will be actually engaged in arbitration on April 10; Mr. Meyer will be in Spain; and, after four years, plaintiff has come upon some testimony of a former Exchange employee which he thinks may be helpful to him. Neither counsel's unavailability on April 10, nor the testimony of a former Exchange employee are reasons for adjourning the return date of the Exchange's motion.

Under the procedures set forth by this Court in the Law Journal, "[m]otions will be taken on submission" and oral argument is not heard unless the Court believes it useful, and then at a date subsequent to the return date. Thus April 10, the return date, is a date for submission of papers only. Mr. Carlson can submit plaintiff's papers in opposition the required number of days prior to April 10, appear at his arbitration on April 10, and argue in opposition at a subsequent date should the Court permit argument. Mr. Meyer can go to Spain. Plaintiff cannot reasonably assert lack of time for preparation as he has been aware of the grounds of this motion since service of defendant's answer over three years ago. He has been aware of defendant's plan to make this motion at least since my letter of February 25, 1975 to your Honor.

Furthermore, no testimony by a former Exchange employee can affect the grounds on which defendant's motion for summary judgment is based. Review of the Exchange's moving memorandum will show that the grounds are (I) failure to prosecute, (II) plaintiff's lack of capacity, and (III) the statute of limitations. The grounds for defendant's motion in respect to judgment on its counterclaims are (IV) contractual right, and (V) waste by the receiver in prosecuting an action on behalf of those whom he has no standing or obligation to represent. Plaintiff mistakes questions going to the merits with the issues raised by defendant's motion.

As far as any motion which plaintiff may wish to make on his own behalf, he has had over four years to do so and the Exchange sees no reason why its motion should be deferred to afford plaintiff 30 more days to make a cross-motion and add to the waste of the assets of the estate in a suit on behalf of those whom plaintiff has no standing to represent.

In my letter to your Honor of February 25, 1975, I fully responded to plaintiff's assertions that there had been an understanding between the parties that this case would be settled, and that such understanding justifies plaintiff's failure to prosecute diligently. In short, there has never been any understanding of any kind. Defendant has taken no affirmative action prior to now because it believed that the best policy was to let "sleeping plaintiffs" lie. Plaintiff is as confused on the question of settlement as he was on his assertion (Mr. Meyer's letter to your Honor of February 20, 1975) that this case "is closely related to another case pending before the Southern District brought by the Stock Exchange against Aubrey Lank and raising similar issues of law and fact". It is my understanding that the reason for the lack of interest on plaintiff's part in prosecuting this action was not an understanding as to settlement, but

the fact that after assertion of the Exchange's counterclaim for waste, the Delaware Chancery Court placed a limitation on the receiver of $2,500 for legal fees to be accrued in prosecution of this action.

It is respectfully requested that the application be denied and that the motion be returnable as noticed.

Sincerely yours,

Russell E. Brooks

REB:ceb

cc: J. Edward Meyer, III

BY HAND

Exhibit D to Brooks Affidavit—Letter from J. Edward Meyer, III to Russell E. Brooks

SPENGLER CARLSON GUBAR & CHURCHILL
ATTORNEYS AT LAW
280 PARK AVENUE, NEW YORK, N.Y. 10017

ROBERT S. CARLSON
JONATHAN H. CHURCHILL
LEONARD GUBAR
CLARK J. GURNEY
JEROME M. LEWINE
J. EDWARD MEYER, III
BRUCE A. RICH
SILAS SPENGLER

GREGORY KATZ
CHARLES E. MATTHEWS, JR.
WILLIAM J. McSHERRY, JR.
JOHN J. NOVAK, JR.
ROBERT L. ROBINSON
LEONARD SCHNEIDMAN
WILLIAM F. TUETING

TELEPHONE
(212) 682-4444
CABLE "ROCKSCOURT"
TELEX 127596

April 16, 1975

Re: Lank v. New York Stock Exchange

Russell Brooks, Esq.
Milbank, Tweed, Hadley & McCloy
1 Chase Manhattan Plaza
New York, New York 10005

Dear Mr. Brooks:

This letter is to confirm our telephone conversation today to the effect that the deposition noticed for Lloyd McChesney on April 22 will be deemed withdrawn at this time without prejudice to its re-service in appropriate form.

As requested, I am enclosing another copy of our Rule 9(f) affidavit. This firm's managing clerk advises me that this affidavit was served on your firm, and receipt of service was acknowledged.

Sincerely,

J. Edward Meyer, III

Enclosure

Affidavit of John J. Jerome

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

- -x

AUBREY B. LANK, as Receiver of Pickard & Company, Incorporated,

Plaintiff,

-against-

THE NEW YORK STOCK EXCHANGE,

Defendant.

71 Civ. 5525 (MEL)

AFFIDAVIT

- -x

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

JOHN J. JEROME, being duly sworn, says:

1. I am a member of the firm of Milbank, Tweed, Hadley & McCloy, attorneys for the defendant New York Stock Exchange, Inc. (the "Exchange"). I make this affidavit in support of the Exchange's motion to dismiss and for summary judgment and in reply to the allegations in the Meyer affidavit.

2. I recall having discussions with the attorneys for the plaintiff regarding a possible settlement of this action. Those discussions did not result in an agreement that the action be held in abeyance. In fact insofar as I was involved they did not result in agreement of any kind.

John J. Jerome

Sworn to before me

April 30, 1975.

Janice K. Johnson

JANICE K. JOHNSON
NOTARY PUBLIC, State of New York
No. 24-7098035
Qualified in Kings County
Cert. Filed in New York County
Commission Expires March 30, 1976

Supplemental Answering Affidavit of J. Edward Meyer, III

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

AUBREY B. LANK, as Receiver of Pickard & Company, Incorporated, Plaintiff, -against- THE NEW YORK STOCK EXCHANGE, Defendant.	SUPPLEMENTAL ANSWERING AFFIDAVIT 71 Civ. 5525 (MEL)

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

J. EDWARD MEYER, III, being duly sworn, deposes and says:

1. I have read the reply affidavits of Russell E. Brooks and John J. Jerome. I reiterate the statement contained in my answering affidavit that based upon my conversations with counsel for defendant I advised the plaintiff that defendant would settle the case after the disposition of all claims of subordinated lenders and the passage of time so that the risk of subsequent suits against the Exchange by subordinated lenders would be minimized or precluded. Plaintiff, thereupon, advised me to prosecute this action no further.

2. My records indicate that I spent time in consideration of such settlement as late as November 8, 1973 well after the date of Mr. Carlson's letter which is attached as Exhibit A to the Brooks' affidavit. Attached hereto as Exhibit A is my letter to the Court of July 17, 1973 in which I advised the Court of such prospective settlement. Significantly, a copy of

such letter went to Russell Brooks who did not reply.

3. Recognizing the rule that a receiver may sue on behalf of a corporation where property of the corporation has fraudulently been diverted, the Exchange in an irrelevant ipse dixit states that the receiver may not sue "any uninvolved" third parties because of such alleged fraudulent transfer. I suggest that the answering papers of plaintiff established that the Exchange is hardly "uninvolved".

4. In a play on words at page 30 of its brief, the Exchange says that to allow Pickard to sue the Exchange would be tantamount to permitting the robber to sue the policeman. This argument is only a throw-away as the cases at pages 19 and 20 of plaintiff's brief establish.

J. Edward Meyer, III

Sworn to before me this
1st day of May, 1975.

Notary Public

GREGORY KATZ
Notary Public, State of New York
No. 31-4522950
Certificate Filed in New York County
Commission Expires March 30, 1976

Exhibit A to Meyer Affidavit—Letter Dated July 17, 1973 from J. Edward Meyer, III to Judge Morris E. Lasker

7/20/17

FIRM ☐ PERSONAL ☐	LAWYERS NAME	SECRETARY	DELIVERED DATE TIME	POSTAGE	☐ DELIVERED ☐ SPEC. DEL. ☐ MAILED ☐ AIR MAIL

July 17, 1973

Re: Aubrey Lank v. New York Stock Exchange

Honorable Morris Lasker
United States Court House
Foley Square
New York, New York

Dear Judge Lasker:

You will recall that the above case is pending before you and that you called the attorneys into your chambers in May for a progress report. I was absent at that time due to a state legislative session.

At your request, I am writing to advise that the case is still not ready for trial. It is my opinion that the case will be settled between the parties prior to trial but after the conclusion of certain related arbitration hearings which are scheduled to be heard this Fall.

On behalf of both parties, I want to express our appreciation for your patience.

Respectfully,

J. Edward Meyer, III

cc: Russell Brooks, Esq.

Memorandum Opinion and Order of Judge Morris E. Lasker, Dated December 29, 1975

OFFICE COPY

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------X

AUBREY B. LANK, as Receiver of
Pickard & Company, Incorporated,

Plaintiff,

71 Civ. 5525

-against-

MEMORANDUM

THE NEW YORK STOCK EXCHANGE,

Defendant.
----------X

APPEARANCES:

SPENGLER, CARLSON, GUBAR & CHURCHILL, ESQS.
280 Park Avenue
New York, New York 10017
Attorneys for Plaintiff
Of Counsel: ROBERT S. CARLSON, ESQ.
J. EDWARD MEYER, III, ESQ.
GREGORY KATZ, ESQ.

MILBANK, TWEED, HADLEY & McCLOY, ESQS.
One Chase Manhattan Plaza
New York, New York 10005
Attorneys for Defendant
Of Counsel: RUSSELL E. BROOKS, ESQ.

LASKER, D.J.

Aubrey B. Lank (Lank) sues the New York Stock Exchange (the Exchange) as Receiver of Pickard & Company, Incorporated (Pickard), a defunct brokerage firm which was a member of the Exchange prior to its liquidation in the Spring of 1968. The complaint alleges violation of Section 6 of the Securities Exchange Act of 1934, 15 U.S.C. §78f, [1/] and seeks damages in excess of $2,000,000., a sum comprised of amounts lost both by Pickard and by various creditors of Pickard when the corporation went under. The Exchange counterclaims for expenses it incurred in the liquidation of Pickard, for amounts expended by its Special Trust Fund to meet Pickard's obligations to its customers and, as a general creditor of Pickard, the Exchange counterclaims against Lank, personally, for waste of corporate assets in pursuing this litigation.

The Exchange moves to dismiss the complaint and for summary judgment on its counterclaims.

The decision to liquidate Pickard was made in May, 1968, after a routine audit revealed substantial deficiencies in its books and records and Exchange employees had unsuccessfully attempted to put the books in order. The Exchange appointed its Chief Examiner, Lloyd W. McChesney, as Liquidator to take control of the company and wind up its business. Pickard executed agreements with the Exchange to reimburse it and its Special Trust Fund for certain

expenses incurred in the liquidation and for sums paid to protect Pickard's customers against loss. The agreements provide the basis for the Exchange's counterclaims here.

Accountants, Exchange employees and the Liquidator uncovered evidence of serious wrongdoing by certain officers and employees of Pickard. The President and Vice President of the corporation, John and Peter Sackville-Pickard, were found to have withdrawn in excess of $650,000. of Pickard's funds without the knowledge of the other officers and directors. They were also found to have participated in numerous violations of the securities laws and rules and regulations of the Exchange. 2/ The Pickard brothers were expelled from the Exchange and their registrations were revoked and lesser disciplinary action was taken against other officers and directors.

In March, 1969, the Exchange petitioned the Delaware Court of Chancery (Pickard is a Delaware corporation) for the appointment of a receiver. According to the affidavit of McChesney submitted in support of the Delaware receivership petition, Pickard's obligations to its customers had been fulfilled and the only remaining general creditors were the Exchange and its Special Trust Fund, whose claims were based on the agreements to reimburse them executed by Pickard at the outset of the liquidation; 3/ the only other claimants of Pickard's assets were the

subordinated lenders and stockholders.

Lank was duly appointed Receiver by the Delaware Court in late April, 1969. On December 17, 1971 he filed this action. [4/] The thrust of the complaint is that the Exchange knew or should have known as early as October, 1966 that Pickard was in violation of its net capital and other rules and that if the Exchange had fulfilled its obligations under §6 to enforce compliance with the securities laws and its own rules, the losses suffered by Pickard's customers, subordinated lenders, shareholders and creditors who advanced money subsequent to October, 1966 would have been prevented.

As stated above, the Exchange moves to dismiss the complaint and for summary judgment on its counterclaims. The motion to dismiss alleges lack of prosecution (Rule 41(b)), lack of capacity as Receiver to raise these claims (Rule 12(b)(6)) and that the action is time barred (Rule 12(b)(6)). Summary judgment on the first and second counterclaims is sought on Pickard's contractual obligation to reimburse the Exchange and its Special Trust Fund and on the third counterclaim because this action is so patently unmeritorious as to constitute a waste of corporate assets. For the reasons which follow, the motion to dismiss for lack of capacity is granted in part, summary judgment is granted as to liability on the first

two counterclaims, and the motion is denied in all other respects.

I.

The motion to dismiss for failure to prosecute is based on the fact that apart from a request for production of documents filed in early 1972, Lank took no action in the litigation from its inception, in December, 1971, until February 1975.

The long period of inertia did not go unnoticed by the court. In fact, on February 11, 1975 we filed an order statistically closing the case.[5/] This action prompted a letter from Lank's counsel in which he represented that the reason for the inactivity was an agreement between the parties not to press the litigation because of a related pending arbitration proceeding. He informed the court that there was also another related case pending between the same parties in the Southern District of New York and that he expected rapid settlement of both cases upon the conclusion of the arbitration. He requested that the case be restored to the docket lest prejudice to the overall settlement be incurred and his request was granted.

The Exchange takes issue with this explanation for the delay. It denies knowledge of any related suit between the parties[6/] and flatly denies the existence of an understanding not to litigate the case.

A close reading of the affidavits of Lank's counsel, J. Edward Meyer, III, reveals that apart from his initial letter to the court requesting that the case be reactivated, he never directly avers that an agreement to settle was reached. Rather, he asserts that after discussions with attorneys for the Exchange, he concluded that the case would be settled by an exchange of releases at the close of the arbitration. To rebut Meyer's contention, or intimation, of an agreement to settle, the Exchange attorneys have submitted a copy of a letter dated March 3, 1972 from Meyer's partner which appears to reject a settlement offer and demand that the litigation be commenced in earnest. Meyer, in turn, produced a letter from him to the court dated July 17, 1973, a copy of which was sent to the opposition, in which he represented his belief that the case would be settled at the conclusion of the arbitration.

The affidavits and exhibits submitted in connection with this motion suggest that, at best, a rather serious misunderstanding existed as to the status of this litigation. We confess some surprise that Meyer would jeopardize a claim he alleges to be worth two million dollars on the strength of an unwritten agreement to settle at some indeterminate future date, much less on a hunch that the Exchange would settle if he simply lay low for several

years. On the other hand, the very fact of his inactivity can be viewed as evidence of a good faith belief on his part that an agreement to settle had been made. Further, his letter to the court of July, 1973, indicates that the Exchange attorneys had notice of Meyer's expectation of settlement and, thus, they must share some, though clearly not equal, culpability for the unconscionable delays.

Having taken note of the regrettable behavior of Lank's attorneys, however, we also note that they have made substantial allegations of misfeasance by the Exchange which ought to be determined on the merits rather than because of attorney dalliance. See generally Link v. Wabash Railroad Co., 370 U.S. 626, 643-49 (1962) (Black, J., dissenting). Moreover, litigation concerning the demise of Pickard has been in process for a good part of the period of delay, see Lansing v. New York Stock Exchange, note 6, supra, and there is, thus, no indication of any serious prejudice to the Exchange by way of lost records or witnesses having to recall matters eight years past which have been long since forgotten. In short, the circumstances do not warrant the drastic sanction sought by the Exchange, and accordingly the motion to dismiss the complaint under Rule 41(b) is denied.

II.

The Exchange maintains that Lank is attempting to assert the claims of creditors, subordinated lenders and stockholders of Pickard, that as Receiver of Pickard he lacks capacity to do so, and that even if he could sue on behalf of those parties he still lacks standing because the Exchange's duty under §6 runs only to public customers of Pickard. We agree that Lank lacks capacity to prosecute claims of third parties against the Exchange and to the extent that the complaint asserts such claims, the motion to dismiss is granted. However, the complaint, in addition to asserting the claims of third parties, also asserts a claim on behalf of Pickard. Insofar as it does, the complaint states a valid claim for relief under §6.

The purpose of a statutory receiver is "to preserve, collect, administer and distribute the property of a corporation." 2 Clark, Receivers §578 (3rd ed. 1959). To effectuate these aims, a receiver is empowered, among other things, to bring suit on behalf of the corporation,[7/] but in Delaware, as elsewhere, it is generally held that a receiver occupies no better position than the corporation and can only assert claims which the corporation could have asserted. Bovay v. H.M. Byllesby & Co., 26 Del. Ch. 69, 78; 22 A.2d 138, 142 (Del. Ch. 1941); 16 Fletcher, Cyclopedia of Corporations, §7847 at 463 (1962 ed.); 2

Clark, Receivers §578(b)(3d ed. 1959, Supp. 1968-69). The other side of the coin is that a receiver may not assert claims which belong to third parties and not to the corporation. Rockwood v. Foshay, 66 F.2d 625, 630 (8th Cir. 1933) (applying Delaware law); Cotton v. Republic National Bank of Dallas, 395 S.W.2d 930, 941 (Tex. Civ. App. 1965); Kennedy v. Fidelity & Deposit Co., 153 Ore. 646, 58 P.2d 625 (Ore. 1936); 16 Fletcher, Cyclopedia of Corporations, §7849 at 467 (1962 ed.).

The parties do not seriously dispute the law. They differ, rather, in their characterization of Lank's complaint. The Exchange maintains that the action is brought solely on behalf of "customers, creditors, subordinated lenders and stockholders of Pickard" (Brief in Support of Motion at 12, March 31, 1975) and that Lank, as Receiver, lacks capacity to do so. Lank, on the other hand, steadfastly asserts that he is properly asserting only a corporate claim. (See Brief in Opposition at 13, April 24, 1975). 8/

Lank's position in this regard is somewhat disingenuous. The complaint is remarkably obscure as to the precise nature of the claim. Averments of the duties of the Exchange to and the damage sustained by Pickard's customers, creditors, subordinated lenders and shareholders are liberally sprinkled throughout. (Complaint ¶¶15, 22, 23, 28, 31, 34, 35, 36) In fact, there are

considerably fewer explicit references to duties or damages to Pickard itself. (Complaint, ¶¶15, 22, 31, 36) The only concrete indication as to whose claims Lank is attempting to recover upon is in the prayer for relief which reads:

> "36. By reason of the foregoing, plaintiff demands judgment against the Exchange for (a) the sum of $269,648.00 paid to the Exchange out of the proceeds of the sale of Pickard's membership in the New York Stock Exchange, plus interest; (b) the sum of $99,650.00 paid by Pickard on February 19, 1969 to the Special Trust Fund of the Exchange, plus interest; (c) the sum of $1,032,220.00 representing all sums advanced by subordinated lenders to Pickard subsequent to October, 1966, plus interest; (d) the sum of $205,126.27 representing all sums due general creditors of Pickard, plus interest; (e) the sum of $466,071.67 representing sums paid by purchasers of shares of stock of Pickard subsequent to October, 1966; and (f) costs plus Receiver's and attorneys fees."

The language of (c) - (e) belies Lank's pretense of asserting Pickard's claims alone. In those phrases he is manifestly seeking the full amount of the damages of Pickard's creditors, subordinated lenders and stockholders.[9/] These are damages sustained by third parties and not by the corporation and he therefore must be held, to that extent, to be asserting their claims. We agree with the Exchange that he lacks capacity to do so. Cf.

Caplin v. Marine Midland Grace Trust Co., 406 U.S. 416 (1972).

This conclusion, however is not the end of the matter, because it is also clear, from (a) - (b) of the quoted language, that Lank seeks damages properly attributable to the corporation as well. The proceeds from the sale of Pickard's seat on the Exchange and money paid by Pickard in partial satisfaction of its obligation to reimburse the Special Trust Fund are clearly assets of the corporation lost as a result of Pickard's demise. They would seem to be properly recoverable by a receiver if the Exchange is legally responsible to the corporation for that demise.

The question thus becomes whether Pickard has a cause of action against the Exchange under §6 of the Securities Exchage Act upon which the receiver may sue. The Exchange takes the position that its duties under §6 run only to public customers of Exchange members and that in any event, Lank, as Receiver of Pickard, would have no authority to assert such a claim because Pickard was the primary wrongdoer in the whole affair. To allow the Receiver, i.e. the corporation, to bring this action would be "tantamount to permitting the robber to sue the policeman for not catching him before he had a chance to rob." (Reply Brief at 30; April 29, 1975)

In New York Stock Exchange v. Sloan, 394 F.Supp. 1303 (S.D.N.Y. 1975) this court considered and rejected the general proposition that the Exchange's duties under §6 run only to public customers, ruling that limited partners and subordinated lenders of a defunct brokerage house, a partnership, had standing to assert §6 claims against the Exchange based in part on its failure to enforce compliance with the net capital rule.

> "[The net capital rule], which relate[s] to the financial soundness of member firms, [is] manifestly intended to protect those who entrust their funds or securities to broker-dealers, and who stand in the kind of relationship to the firm which requires them to rely on its compliance with the rules. The Baird court [Baird v. New York Stock Exchange, 141 F.2d 238 (2d Cir.) cert. denied, 323 U.S. 737 (1944)] found that public customers clearly fall into this category; in our view, the same rationale applies to limited partners and subordinated lenders ... No matter how their investment in the firm is characterized they clearly have a large stake in the enforcement of the rules. Because their status requires them to rely on the general partners both to manage the enterprise and to comply with the net capital ... rule, they are entitled to the Exchange's diligent enforcement of [it]." 394 F.Supp. at 1310-11.

The same reasoning supports an action by a corporation, at least where, as here, the action is asserted by a receiver in liquidation. A corporation, like the

customers, subordinated lenders and limited partners of a brokerage firm, is required by its status to rely on those responsible for the management of the firm to comply with the net capital rule and is therefore entitled to the Exchange's diligent enforcement. A brokerage corporation as an entity is more than its officers and directors. It is also capable of sustaining damages as a result of violations of the securities laws and regulations and the rules of the Exchange by those charged with its day to day control. In such circumstances a corporation is entitled to the benefits and protection of §6 and has standing to sue accordingly.

The Exchange's argument that Lank cannot bring suit because Pickard was the primary wrongdoer is an oversimplification. Although as a general rule a receiver is, of course, subject to the same defenses as the corporation there is ample authority for giving a receiver power to sue where the corporation could not in a case where the corporation would be denied recovery because of

officers' participation or involvement in wrongdoing. It is well settled, for instance, that where a corporation has transferred funds in fraud of its creditors, the receiver may maintain an action against persons to whom the transfers were made to enforce the rights of the corporation and its creditors and recover the funds even though the corporation could not do so. Bovay v. H.M. Byllesby & Co., supra; Keedy v. Sterling Electric Appliance Co., 13 Del. Ch. 66, 115 A. 359, 363 (Del. Ch. 1921); 16 Fletcher, Cyclopedia of Corporations, §§7810 at 401-02; 7847 at 465-67 (1962 ed.). It is in this sense, and only this sense, that a receiver is said to "represent not alone the corporation ... but as well the interests of all creditors." Keedy v. Sterling Electric Appliance Co., supra, 115 A. at 363. This is not inconsistent with our conclusion that Lank may not sue to collect the damages sustained by the creditors. He "represents" these third parties' interests not by suing on their claims to recover the full amounts of the damages they suffer, but by suing to recover corporate damages. To say that he is enforcing the creditors' rights is simply to say that in accordance with his statutory mandate, see note 7, supra, he is attempting to maximize the pool of corporate assets in order to satisfy the corporation's obligations to the greatest extent

possible. This long standing rule which applies to fraudulent transfers of corporate assets appears especially suitable to the case at hand. In both instances the defendants bear responsibility for the loss to the corporation and those who would benefit from the suit bear none. 10/

Courts have not hesitated to grant trustees in bankruptcy a right of action under §6. In Petitt v. American Stock Exchange, 217 F.Supp. 21 (S.D.N.Y. 1963) the corporate reorganization trustee of a corporation alleged to have been defrauded of 587,000 shares of its stock through the facilities of Amex in a rigged market was allowed to assert a §6 claim against Amex over the defendant's objection that the damage to the corporation stemmed primarily from the wrongdoing of corporate insiders. 217 F.Supp. at 29. The Court of Appeals for the Seventh Circuit similarly allowed a trustee in bankruptcy of a securities dealer to bring a §6 action based on a violation of the "Know Your Customer" rule. Buttrey v. Merrill Lynch Pierce Fenner & Smith, Inc., 410 F.2d 135 (7th Cir.) cert. denied, 396 U.S. 838 (1969). There the court held that the trustee, by virtue of his authority under §§70e and 60e of the Bankruptcy Act, 11 U.S.C. §110(e) and 96(e), could attempt to recover customers' funds converted by the bankrupt's principal and placed in an account with the defendant. Of course, since Buttrey involved an issue

of the bankruptcy trustee's statutory authority under the Bankruptcy Act it is not directly applicable in the instant case. But it does support the proposition that a trustee in bankruptcy, or a receiver, [11/] should be allowed to employ all the legal tools at his command to pursue assets and claims of the corporation against those who share some legal responsibility for the corporation's downfall. The Buttrey court explicitly rejected the contention that the trustee was barred from recovery by the responsibility of the bankrupt's principal for the illegal transaction, 410 F.2d at 139.

Finally, and closest on its facts to the case at hand, in Seligson v. New York Produce Exchange, 378 F. Supp. 1076 (S.D.N.Y. 1974), the court allowed the trustee in bankruptcy of a brokerage firm to bring an action against the New York Produce Exchange for violation of its duties under the Commodities Exchange Act to maintain an orderly market. The court rejected the plaintiff's reliance on Buttrey to defeat the defense of in pari delictu because in Seligson the trustee's action was brought under §§70(a)(5) and 70(a)(6) of the Bankruptcy Act, 11 U.S.C. §§110(a)(5), 110(a)(6), under which the trustee is subject to the same defenses as the corporation. This, of course, is the Exchange's position with regard to Lank's authority as Receiver. 378 F.Supp. at 1085-86.

Nevertheless, the court disallowed the defense as contrary to the policy of the Commodities Exchange Act, which places heavy reliance on enforcement and self-regulation by the Commodities Exchanges for the protection of investors. 378 F.Supp. 1085-86. A similar policy underlies the Securities Exchange Act, [12/] see New York Stock Exchange v. Sloan, supra, 394 F.Supp. at 1310, although the obligations of the Securities Exchanges are not as broad as those of the former. Id., 394 F.Supp. 1315 n. 16. Despite the similarity of the two Acts, and partially because of this disparity of responsibility, we declined in Sloan to allow the general partners of a bankrupt brokerage firm to rely on Seligson to overcome the in pari delictu defense, noting that the general partners shared personal responsibility, if not culpability, for the firm's demise. [13/] Id. at 1315 and n. 16. To hold this reasoning applicable in the instant case because Pickard, like the general partners, was a member of the Exchange, would be to honor form over substance. We have already noted that we find a corporation to possess characteristics distinct from those of the general partners in Sloan. Supra at 11-12. Moreover, here, as in Seligson, the ultimate beneficiaries of any recovery by Lank are third parties who share no culpability for Pickard's wrongdoing and ultimate demise.

See Keedy v. Sterling Electric Appliance Co., supra; 16 Fletcher, Cyclopedia of Corporations, §§7810; 7847, supra.

III.

The Exchange also moves to dismiss on the grounds that the action is time barred, asserting that Lank's §6 claim is governed by the three year statute of limitations of NYCPLR 214(2), the statute governing actions to recover on a liability created by statute. Lank, citing Weinberger v. New York Stock Exchange, 335 F.Supp. 139 (S.D.N.Y. 1971), counters that the six year period of NYCPLR 213(2) has been held to govern a §6 action.

The question is not free from doubt. In the absence of a specific federal statute of limitations, the state statute governs Cope v. Anderson, 331 U.S. 461 (1947); and where there is no exact state counterpart to the federal claim asserted, the limitations period for the state action most analogous to the federal claim is applied. International Union United Auto Workers v. Hoosier Cardinal Corp., 383 U.S. 696, 704-06 (1966). There is appeal to the rather straightforward proposition that an action based on §6 of the Securities Exchange Act is one which seeks to recover on a liability created by statute and is therefore governed by the three year period. The New York cases which define a "liability created by statute" as one which would not exist but for the statute

which created it, see Frank Shepard Co. v. Zachary P. Taylor Pub. Co., 234 N.Y. 465 (1923); Bevelander v. Town of Islip, 10 App. Div. 2d 170, 199 N.Y.S.2d 561 (2d Dept. 1960) lend support to this position, because there is no common law or state law counterpart to a §6 suit against the Exchange. Raldiris v. Simmons, 242 App. Div. 603, 271 N.Y.S. 1018 (1st Dept. 1934), aff'd 266 N.Y. 577 (1935); Morgenbesser v. New York Stock Exchange, CCH Fed. Sec. L. Rep. ¶93,210 (Sup. Ct. Nassau Co. 1971).

The question, however, is more complex. In Weinberger v. New York Stock Exchange, supra, the plaintiff filed a complaint alleging a §6 violation and the Exchange moved to dismiss the action as time barred under NYCPLR 214(2). The plaintiff then served an amended complaint, which, although alleging the same facts as the original, pleaded a third-party beneficiary contract theory instead of a §6 violation. The theory was premised on the contract §6 requires the Exchange to enter into with the SEC, by which the Exchange promises to enforce, to the extent of its powers, compliance by its members with the securities laws and with its rules. Weinberger v. New York Stock Exchange, supra, 335 F.Supp. at 140-42. In a closely reasoned and persuasive opinion, Judge Gurfein determined that the third party beneficiary theory stated a valid contract claim, [14/] 335 F.Supp. 142-45,

and concluded that the action should therefore be governed by the six year contract limitations period of NYCPLR 213(2). 335 F.Supp. at 145.

The obvious distinction between Weinberger and the instant case is that Lank has pleaded a statutory and not a contract theory of recovery. However, it offends common sense and the spirit of the Federal Rules to hold that what is for all practical purposes the identical claim should or should not be time barred because of the wording of the complaint.[15/] We find the analysis in Weinberger convincing and conclude that actions brought pursuant to §6 are neither purely statutory or contractual in nature, but a hybrid. The statute requires only that in order to be licensed to do business as a stock exchange, the Exchange must contract with the SEC to do certain things.[16/] Thus, although the duty has its genesis in the statutory provision, see People v. Corcillo, 195 Misc. 198, 88 N.Y.S.2d 534, 535 (Sup. Ct. Albany Co., 1949), aff'd 276 App. Div. 679, 97 N.Y.S.2d 319, leave to appeal denied, 277 App. Div. 911, 98 N.Y.S.2d 592 (3rd Dept. 1950) on close analysis, it is a contractual duty. The Exchange is not required by the statute to do business. Section 6 only describes the nature of a contract which must be made if a license to do business is to be granted. Cf. People v. Corcillo, supra, 195 Misc.198, ___, 88 N.Y.S.2d 534, 535-36.

Moreover, absent a specifically indicated statute of limitations, a federal court ought not to ignore considerations of federal policy and of justice in determining which statute is to be applied. Cf. Weinberger, supra, 335 F.Supp. at 145 and cases cited there. A three year limitation period seems peculiarly inappropriate to a §6 action. Discovery, or even a hint of past failure of a stock exchange to enforce its rules against a member is unlikely to occur until after disaster has struck and there has been an opportunity to investigate the causes. Any disadvantage to the defendant exchange by the longer period is limited by the institutions' extensive record keeping practices.

In sum, we conclude that the provisions of NYCPLR 213(2) should be applied in an action brought under §6 of the Securities Exchange Act. Since the complaint alleges the Exchange's failure to fulfill its obligations as early as October, 1966 and was filed in December, 1971, Lank's action is not time barred.

IV.

The first and second counterclaims of the Exchange are based on the agreements executed by Pickard by which Pickard undertook to reimburse both the Exchange and the Special Trust Fund for certain expenses incurred in the liquidation (see pages 1/-2, supra). On February 13,

1968 Pickard agreed to assume responsibility and liability for all acts and omissions of Exchange employees performing work for Pickard. Three months later, on May 16, it agreed to repay to the Special Trust Fund all sums advanced by the latter to meet Pickard's obligations to its customers and creditors and to reimburse the Exchange for the compensation of the Liquidator and other Exchange employees assigned to work on the liquidation. (Exs. B and C, Bishop Affidavit, March 31, 1975)

The Exchange has met its burden of showing an absence of genuine issue of material fact on the question of liability, and is entitled to summary judgment on that issue. The affidavit of Robert M. Bishop, Senior Vice President of the Exchange, adequately sets forth the execution of the agreements and the Exchange's performance and expenditure of funds thereunder. Annexed to Bishop's affidavit is the affidavit of the Liquidator in connection with the petition for receivership which sets forth the facts of execution and performance in some detail.

Lank's attempt to show, or rather pretense of showing, a genuine material issue of fact in opposition to the motion amounts to no more than a frivolous effort to raise the spectre of duress in the execution of the May 16 agreement between Pickard and the Exchange. (Lank

Affidavit, April 25, 1975; ¶9) To support this conjecture, Lank has annexed to his affidavit four pages of a transcript of testimony given by one Gerrit Lansing, a non-voting stockholder and subordinated lender of Pickard, in relation to another proceeding, Lansing v. New York Stock Exchange. Supra, note 6. The sum and substance of this testimony, read in the light most favorable to Lank, is that in June, 1968, Bishop showed Lansing a discouraging financial statement of Pickard. Bishop then told Lansing that there was little hope of recovering on his subordinated loans and that he was required to sign the May 16 agreement. Lansing declined to do so until he consulted with his lawyer, and, in fact, he never signed it. (Lank Affidavit, April 25, 1975; Ex. E)

Questions of admissibility aside, this transcript falls so far short of raising a genuine factual issue that its inclusion in Lank's papers is an insult to the intelligence of the court. Not only does the fact that Lansing declined to sign refute all inference of duress, but there is no indication whatsoever that Lansing's signature - or that of any other subordinated lender - was required to validate the agreement which was signed by all the corporate officers and all the voting shareholders of Pickard. Lank nowhere claims that the contract is deficient for lack of the signatures of the subordi-

nated lenders, and indeed, such a claim would appear to controvert hornbook corporate law.

Lank also argues that it would be improper to grant summary judgment since the Exchange has asserted these claims in the receivership proceeding which is still pending. The Delaware Court does not have exclusive jurisdiction of the controversy, however, and the Exchange is hardly barred from asserting a legitimate counterclaim in a federal proceeding brought by Lank.

Finally, Lank contends that the Exchange should be prevented from asserting these claims because it is seeking to profit from its own wrong. (Brief in Opposition at 31) In our view, however, the validity of the contractual obligation and the culpability of the Exchange under §6 for Pickard's ultimate demise are separate issues. It is true that if Lank ultimately prevails on the merits of his claim, sums paid by Pickard to the Exchange as a result of the liquidation would appear to be recoverable assets of the corporation, but this is no reason to deny summary judgment here on the initial question of Pickard's contractual obligation, an obligation nowhere seriously contested by Lank.

For the foregoing reasons, summary judgment on the first and second counterclaims is granted as to liability alone. We decline, however, to grant the Exchange's

demand for the sum of $227,007.51 allegedly due. The amount is substantial and the evidence, consisting merely of conclusory affidavits alleging gross debts of $56,712.09 and $170,295.42 to the Exchange and the Special Trust Fund respectively, is inadequate to support the summary judgment. The agreements do not purport to reimburse the Exchange for every expense incurred, and it remains to be established that the full amount sought is recoverable. Since the ultimate question of entitlement to these funds does depend on the merit of Lank's action, the execution of the judgment would be stayed in any event pending final determination of Lank's claims.

V.

For its third counterclaim the Exchange seeks damages as a creditor of Pickard against Lank personally for waste of corporate assets in pursuing this litigation. Apart from questions of the propriety of asserting a claim against Lank personally in an action Lank has brought solely in his capacity as Receiver of Pickard, the Exchange's motion for summary judgment on this counterclaim is without merit and must be denied. Lank obtained an order from the Delaware Chancery Court expressly authorizing this suit. (Ex. F, Lank Affidavit, April 21, 1975). Moreover, this issue was fully litigated before the Delaware Court on a subsequent motion by the Exchange

to compel Lank to terminate this suit as a waste of assets. (Ex. G, Lank Affidavit, supra) The Chancellor held that this action does not constitute waste (New York Stock Exchange v. Pickard & Company, Inc., Civil Action #29997 (Del. Ch., Oct. 9, 1972) (Ex. G, Lank Affidavit, supra) and this decision would appear to be res judicata on the Exchange's counterclaim. Even if it were not, our decision today that Lank has stated a valid claim against the Exchange precludes the conclusion that the action is so totally devoid of merit as to constitute a waste of assets.

The motion to dismiss for lack of capacity is granted to the extent Lank seeks to recover claims of Pickard's creditors, subordinated lenders and shareholders. Summary judgment is granted on the first and second counterclaims as to liability. In all other respects, the motion is denied.

It is so ordered.

Dated: New York, New York
December 29, 1975.

MORRIS E. LASKER
U.S.D.J.

FOOTNOTES

1. The complaint also contains common law counts of fraud, negligence and breach of contract. These issues have no bearing on the present motion because the Exchange has limited its attack to the federal claim. If the Exchange is successful, of course, this court will lose jurisdiction over the other counts which are asserted on the basis of pendant jurisdiction. United Mine Workers v. Gibbs, 383 U.S. 715 (1966).

2. The complaint against Messrs. Pickard in an SEC proceeding charged them

> "with selling unregistered stock, with manipulation of the market, with effecting transactions through dummy accounts, with making untrue and deceptive and misleading statements, with unlawfully extending and maintaining credit to customers in violation of Regulation T, with failing to keep accurate current records and accounts, with wrongfully comingling customers' securities without their prior consent and wrongfully hypothecating such securities, with failing to file a certified report of Pickard's financial condition for the calendar year 1967 within the time required, and with other violations of the Securities Laws."

(Affidavit of W. McChesney Lloyd, ¶26, attached as Exhibit A to the Bishop Affidavit, March 3, 1975.)

3. Lank disputes the Exchange's contention that it is the only remaining unpaid general creditor of Pickard, asserting that there are approximately 30 others, whose claims are in excess of $100,000. (Lank Affidavit, ¶8, April 21, 1975).

4. It should be noted that Lank originally sought to assert his present claims as counterclaims against the Exchange in the Delaware receivership proceeding in the Spring of 1971. On September 20, 1971, however, the Chancellor decided that he lacked jurisdiction to consider the matter in view of his conclusion that "a fair reading of the counterclaim shows that it is based on Section 6 of the Securities Exchange Act of 1934." New York

Stock Exchange v. Pickard & Company, 282 A.2d 651, 652 (Del. Ch. 1971).

5. A directive from the Administrative Office of the United States Courts allows a District Court to statistically close cases which have been pending for more than three years in which no action has been taken for a period of 12 months.

6. No other case in this district or elsewhere between these parties has been called to the court's attention. There has been other litigation based on Pickard's collapse, however, Lansing v. New York Stock Exchange, 68 Civ. 2872 (S.D.N.Y. July 9, 1973) (Bonsal, J.); and Lank and the Exchange are both defendants in an action filed last April currently pending before this court. Fischer v. New York Stock Exchange, 75 Civ. 1638.

7. The Delaware statute which defines the powers of an insolvency receiver expressly authorizes him to:

> "take charge of [the corporate] assets ... and to collect the outstanding debts, claims and property due and belonging to the corporation, with power to prosecute and defend ... all claims or suits ... and to do all other acts which might be done by the corporation." 8 Del. Code Ann. §291 (1975).

The order of the Delaware Court appointing Lank the Receiver of Pickard tracks the language of the statute. (Exhibit A, Lank Affidavit, April 25, 1975).

8. In fact, Lank's position as elaborated in his brief is somewhat opaque. If our conclusion that he does not seriously dispute the law is incorrect, then we believe that the authorities cited above demonstrate clearly that his position cannot withstand scrutiny.

Moreover, in view of the apparent concession made by the Exchange in the Delaware Court proceedings, see New York Stock Exchange v. Pickard & Co., Inc., Civ. Action #29997 (Del. Ch., Oct. 9, 1972) (Ex. G, Lank Affidavit) discussed more fully at V, infra, that this action is at least partly brought on behalf of the corporation, (a position consistent with the conclusion we reach today) the more rigid position taken on this motion is puzzling. It serves only to obscure the issue

for determination here and exhaust precious judicial time in the determination of this motion.

9. Cf. Buttrey v. Merrill, Lynch, Pierce, Fenner & Smith, Inc., 410 F.2d 135, 137 (7th Cir. 1969), where the court allowed a trustee in bankruptcy to maintain a §6 action on behalf of the bankrupt corporation, noting that "The trustee is not seeking to recover the full amount of the claims of the bankrupt's customers but only the net amount of the transfers by the bankrupt to the defendant."

10. We, of course, express no opinion on the merits of Lank's case. For purposes of this motion we accept as true the allegations of the complaint.

11. There is strong similarity between the role of a trustee in bankruptcy and an insolvency receiver in regard to their position vis a vis creditors and stockholders. Bovay v. H.M. Byllesby & Co., supra, 22 A.2d at 142.

12. The authorities relied upon in Seligson are cases which rejected the in pari delictu defense in the context of securities laws violations. Pearlstein v. Scudder and German, 429 F.2d 1136, 1141 (2d Cir. 1970), cert. denied, 401 U.S. 1013 (1971); Nathanson v. Weis, Voisin, Cannon, Inc., 325 F.Supp. 50 (S.D.N.Y. 1971) (Weinfeld, J.).

13. As previously noted, we did allow the limited partners and subordinated lenders in Sloan to bring suit against the Exchange based on §6 in partial reliance on the policy of self regulation of the securities laws. 394 F. Supp. at 1310.

14. Although the idea of a third party beneficiary theory of recovery was not new, see Baird v. Franklin 141 F.2d 238, 242 & 244 (2d Cir. 1944), Weinberger was the first case to explicitly uphold the availability of such a claim. Weinberger was defeated on the merits. Weinberger v. New York Stock Exchange, 69 Civ. 4461 (S.D.N.Y. November 6, 1975) (Bonsal, J.).

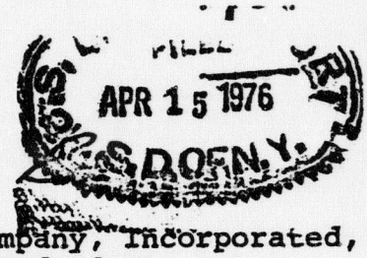
15. Even if we did dismiss the complaint we would allow leave to replead, and under Rule 15(c) the amended complaint would relate back to the time of filing of the original.

16. Judge Gurfein rested his analysis in large part on the explicit, and apparently self-conscious, requirement

by Congress that as a condition to registration a securities exchange enter an agreement with the SEC. 335 F.Supp. 144-45. We are aware that recent amendments to §6 have eliminated the statutory requirement of an agreement. (Securities Act Amendments of 1975, Pub. L. No. 94-29, 89 Stat. 104 June 4, 1975). These amendments took effect December 1, 1975, however, and therefore whatever effect they may ultimately have on the third party beneficiary theory of recovery, they have no bearing on this action.

Memorandum Endorsement of Judge Morris E. Lasker, Dated April 16, 1976

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ENDORSEMENT

AUBREY B. LANK, as Receiver of Pickard & Company, Incorporated, Plaintiff, v. THE NEW YORK STOCK EXCHANGE, Defendant.
71 Civ. 5525

LASKER, D.J.

The New York Stock Exchange moves for an order pursuant to 28 U.S.C. §1292(b) to certify for immediate appellate review two questions determined by our Memorandum and Order of December 29, 1975: "(1) whether the receiver of a former member corporation of the Exchange has standing (or alternatively 'capacity') to assert a claim against the Exchange under Section 6 of the Exchange Act on behalf of the former member corporation, and (2) whether the receiver's claim under Section 6 is barred by the applicable statute of limitations." The Exchange argues that both of these issues are, in the words of the statute, "controlling question[s] of law as to which there is substantial ground for difference of opinion and that an immediate appeal ... may materially advance the ultimate termination of the litigation." 28 U.S.C. §1292(b). We agree.

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All three statutory requirements are fully met in this case. See generally Gottesman v. General Motors Corp., 268 F.2d 194 (2d Cir. 1959). A question is clearly controlling if its determination in favor of one of the parties will terminate the action. 9 Moore's Federal Practice, ¶110.22[2] at 259 (1975). The matter of Lank's capacity to bring this suit is controlling in this sense. Lank argues with respect to the second question, whether Section 6 claims are governed by the three or six year statute of limitations, that even if the shorter period applies the Exchange is estopped from asserting the defense. While such an argument may be theoretically sound, there is nothing in the record to date which indicates that the Exchange is charged or chargeable with the kind of fraudulent concealment of the facts from the plaintiff which is required to bring the doctrine of estoppel into play, see, e.g., General Stencils, Inc. v. Chiappa, 18 N.Y.2d, 125, 272 N.Y.S.2d 337 (1966), and, under these circumstances, we are inclined to view this question, too, as controlling within the meaning of the statute. See, generally, 9 Moore's Federal Practice, supra, 359-60.

That there is a substantial ground for difference of opinion as to both issues for which leave to appeal is sought appears quite clear. The question of standing in Section 6 cases is sufficiently novel and open to dispute to qualify in this regard, and the statute of limitations question is by

no means free from doubt. (The Exchange has called attention to a very recent decision by Judge Carter in the Northern District of California which holds that the appropriate limitations period in a Section 6 action is the period provided for liabilities created by statute, precisely the claim urged in this case by the Exchange. Wilson v. Meyerson, 72 Civ. 1298, April 7, 1976.)

Finally, we note that both questions have significance well beyond their importance to the parties in this case. Although Lank argues that this is not an appropriate consideration in determining an application under §1292(b), the law in this Circuit appears to be to the contrary. In Brown v. Bullock, 294 F.2d 415 (2d Cir. 1961) Judge Friendly indicated that leave to appeal had been granted in that case at least in part because the "determination was likely to have precedential value for a large number of other suits." 294 F.2d at 417. And see Ross v. Bernhard, 403 F.2d 909, 910 (2d Cir.), rev'd on other grounds, 396 U.S. 531 (1970); Sobel v. Herz, Warner & Co., 338 F.Supp. 287, 299-300 (S.D.N.Y. 1971). Contra, Bobolakis v. Compania Panemana Maritima San Gerassimo, S.A., 168 F.Supp. 236 (S.D.N.Y. 1958).

For the foregoing reasons, the motion is granted.

Submit order on notice.

Dated: New York, New York
April 15, 1976.

Marvin E. Frankel
U.S.D.J.

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COUNTER 9163-14

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- x

AUBREY B. LANK, as Receiver of Pickard & Company, Incorporated,

Plaintiff,

- against -

THE NEW YORK STOCK EXCHANGE,

Defendant.

- x

71 Civ. 5525 (MEL)

COUNTER- ORDER

A motion having been made by defendant New York Stock Exchange, Inc. for an order pursuant to 28 U.S.C. § 1292(b) modifying and re-entering the memorandum opinion and order of the Court dated December 29, 1975, so as to certify for immediate review by the United States Court of Appeals for the Second Circuit the following questions decided in that opinion and order: (1) whether the receiver of a former member corporation of the Exchange has standing (or alternatively capacity) to assert a claim against the Exchange under Section 6 of the Securities Exchange Act of 1934 on behalf of the member corporation, and (2) whether the receiver's claim under Section 6 is barred by the applicable statute of limitations,

AND, after due deliberation, the Court having found by endorsement decision dated April 15, 1976 each of the issues as to which certification is sought to be controlling questions of law as to which there is substantial ground for difference of opinion and that an immediate appeal as to each may materially advance the ultimate termination of the litigation,

NOW, on motion of Milbank, Tweed, Hadley & McCloy, attorneys for defendant, it is

ORDERED, that defendant's motion for certification for immediate review by the United States Court of Appeals for the Second Circuit pursuant to 28 U.S.C. § 1292(b) is granted,

AND, the memorandum opinion and order of December 29, 1975 is modified and re-entered to add to the opinion of the Court that as to each of the questions (1) whether the receiver of a former member corporation of the Exchange has standing (or alternatively capacity) to assert a claim against the Exchange under Section 6 of the Securities Exchange Act of 1934 on behalf of the member corporation, and (2) whether a three-year or six-year statute of limitations is applicable to the receiver's claim under Section 6, such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal may materially advance the ultimate termination of the litigation.

Dated: New York, New York
April 4, 1976

David N. Edelstein
U.S.D.J.

Memorandum Opinion of Judge Morris E. Lasker, Dated April 30, 1976

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------X

AUBREY B. LANK, as Receiver of
Pickard & Company, Incorporated,

Plaintiff,

71 Civ. 5525

-against-

MEMORANDUM

THE NEW YORK STOCK EXCHANGE,

44337

Defendant.
----------X

APPEARANCES:

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Attorneys for Defendant
Of Counsel: RUSSELL E. BROOKS, ESQ.

LASKER, D.J.

The counter-order proposed by plaintiff's counsel in connection with certification of certain questions to the Court of Appeals has been signed and filed today. That order has been signed because it puts before the Court of Appeals in purest form the question to which an answer will expedite the disposition of this case.

Certifying the counter-order is not inconsistent with the language from the court's memorandum opinion of December 29, 1975 quoted in the letter of April 26, 1976 of counsel for the Stock Exchange, nor does it change the decision heretofore reached as to certification. Indeed, the language of the counter-order seems more likely to be acceptable to the Court of Appeals than the language suggested by counsel for the defendant.

Dated: New York, New York
April 30, 1976.

MORRIS E. LASKER
U.S.D.J.

COPY RECEIVED

SPENGLER DAWSON GUYER & CHURCHILL

ATTORNEYS FOR Lamb

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